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FIREARMS PROVISIONS IN S. 1523

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1523

A BILL TO AMEND CHAPTER 96 OF TITLE 18, UNITED STATES CODE

MAY 19, 1988

Serial No. J-100-65

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S521-16

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Metzenbaum, Hon. Howard M 1
Thurmond, Hon. Strom 2
Hatch, Hon. Orrin G 35
DeConcini, Hon. Dennis 70

CHRONOLOGICAL LIST OF WITNESSES

Keeney, John C., acting assistant attorney general, Criminal Division, U.S. Department of Justice; accompanied by Paul Coffey, Deputy Chief, Organized Crime and Racketeering Section 3
Vaughn, Jerald R., executive director, International Association of Chiefs of Police 21
Panel consisting of: Lawrence D. Pratt, executive director, Gun Owners of America; James Jay Baker, director of Federal Affairs, Institute For Legislative Action, National Rifle Association of America; and Neal Knox, executive director, Firearms Coalition 34

PROPOSED LEGISLATION

Text of S. 1523—A bill to amend chapter 96 of title 18, United States Code 77

ALPHABETICAL LIST AND SUBMITTED MATERIAL

Baker, James Jay:
  Testimony 52
  Prepared statement 54
Keeney, John C.:
  Testimony 3
  Prepared statement 9
  Agency views on S. 1523 .... 17, 20
Knox, Neal:
  Testimony 63
  Prepared statement 65
Pratt, Lawrence D.:
  Testimony 34
  Prepared statement 39
Vaughn, Jerald R.:
  Testimony 21
  Prepared statement 24

APPENDIX

S. 1523 as reported from committee 77

FIREARMS PROVISIONS IN S. 1523

THURSDAY, MAY 19, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard Metzenbaum (acting chairman) presiding.

Also present: Senators Thurmond, DeConcini, and Specter.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The committee will come to order.

The RICO reform bill before the committee would make certain Federal firearms felonies a basis for actions under the Nation's anti-racketeering law. These provisions would help the Justice Department prosecute the ring leaders of illegal drug activity. They would provide a powerful enforcement tool for attacking organized crime. Frankly, it is difficult to understand why these provisions should be controversial.

The bill would add a number of the Federal firearms felonies to RICO, including knowing sale of guns to convicted felons, knowing receipt of guns by convicted felons, knowingly trafficking in stolen firearms, and trafficking in firearms by convicted felons.

I will modify the proposal that I had spoken about more recently to eliminate that provision having to do with recordkeeping because I am concerned that that could possibly make somebody subject to a RICO claim who was operating a firearms store and, really, that is not the thrust of what these amendments are about.

RICO prosecutions do not require proof that ring leaders themselves have pulled the trigger or committed some other specific criminal act. Rather, the law requires proof that higher-ups directed criminal enterprises which pursued a pattern of criminal activity. Thus, RICO provides a crucial tool for prosecuting kingpins when other prosecutorial weapons are inadequate.

By authorizing prosecutors to build a racketeering case in part on firearms felonies, Congress will make it much easier to win convictions against the kingpins who direct organized illegal activity.

According to Federal law enforcement authorities, organized drug activity and firearms felonies go hand in hand. At least 17 percent of those prosecuted last year for Federal firearms felonies were known to be tied to organized crime, while more than 60 percent of firearms felons were also users or traffickers of illegal narcotics.

Jamaican drug rings offer prime examples of the drugs and gun connection. Earlier this year, Senator DeConcini eloquently described the law enforcement problem presented by Jamaican drug gangs.

According to Senator DeConcini, "Jamaican drug gangs, who call themselves posses, taken from the old wild west movies, have taken control of the crack trade in cities across the country. They are better armed than the police and it is not unusual for them to be armed with AK-47s or Uzis. Law enforcement experts say they have been responsible for at least 600 murders in the last 3 years."

The RICO bill under consideration adds nine other types of Federal criminal offenses to RICO. Frankly, it is amazing why, of all these proposed amendments, objection has been raised only to firearm violations. This is particularly true since serious firearm violations are more closely related to serious organized crime than the other provisions in the bill.

Including firearms felonies in RICO will not cost millions of dollars. It will not require the involvement of the military. What it will do is make it easier for law enforcement to put drug kingpins out of business.

I have indicated a willingness to work with law enforcement and other members of the committee to limit my amendment to provisions which are most useful to law enforcement. I would hope the hearing would help us achieve that objective.

Senator Thurmond, do you have an opening statement?

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Yes, sir. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased we are having this hearing today to consider the possible addition of certain firearms violations as predicate RICO acts.

As stated by different members of this committee during last week's executive meeting, it is appropriate and necessary to gather additional information as to whether these firearms violations should necessarily be included as predicate RICO offenses. I commend Senator Metzenbaum for calling this hearing to begin our inquiry on the inclusion of these predicate acts.

Congressional efforts to reform civil RICO have been to address a generally acknowledged abuse of the current RICO statute. Legislative initiative in this area has focused on narrowing RICO claims to reflect the original intent of this valuable law enforcement tool in fighting organized crime.

The Racketeer Influenced and Corrupt Organizations Act of 1970 was a very worthy attempt by the Congress to craft a Federal statute which would be effective against professional criminals, especially organized crime. Today, we begin to explore the necessity of including particular firearms violations as predicate acts under the RICO statute.

Specifically, this committee should make inquiry as to whether there are sufficient criminal penalties currently in place that address these firearms violations. Further, it would be helpful to hear from the Department of Justice on the extent to which they believe that organized crime is involved in these types of violations.

Additionally, it is important to keep in mind that a successful civil suit brought by the government requires proof by only a preponderance of the evidence, not the criminal burden of proof beyond a reasonable doubt.

Considering the very real possibility of threefold actual damage awards under civil RICO, it is likely that a defendant could be put out of business by a civil RICO judgment.

Because a person's livelihood is at risk with a showing by a preponderance of the evidence, we must be certain that such actions are used against the criminal element, not the law-abiding citizen.

The gun dealers of our Nation deserve our serious attention to the inclusion of these firearms violations to the potent list of predicate acts under the RICO statute and their implications.

I welcome the witnesses here today and look forward to receiving their testimony.

Senator **Metzenbaum**. Thank you, Senator Thurmond.

It was Senator DeConcini whose amendment was being considered when we determined to go forward with this hearing, because prior to that time I had been informed by Mr. Frank Keating, formerly of the BATF, that the Treasury Department supported the inclusion of these provisions in the bill.

It is my understanding Mr. Keating is not here. I tried to reach him this morning when I learned he was not going to be here because I would like to know why he is not here, particularly in view of the fact that it was part of the supporting basis on which I was indicating I thought that the language ought to be included, the new offenses.

We are very pleased to welcome Mr. John C. Keeney, Acting Assistant Attorney General of the Criminal Division of the Department of Justice. I think it is known that this committee has a 5-minute rule, with the understanding that the entire statement will be included in the record.

We are happy to welcome you, Mr. Keeney.

STATEMENT OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY PAUL COFFEY, DEPUTY CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION

Mr. **Keeney**. Thank you, Chairman Metzenbaum. If you do not mind, I would like to have with me my colleague, Paul Coffey, who is a deputy chief in our Organized Crime Section, and is a true expert on the subject of RICO.

Senator **Metzenbaum**. We are happy to have Mr. Coffey with us.

Mr. **Keeney**. Mr. Chairman, I will try to adhere to the 5-minute rule.

Senator **Metzenbaum**. Thank you, sir.

Mr. **Keeney**. I appreciate the opportunity to be here. I understand that the subject matter today is going to be limited to the addition of new offenses to the list of RICO predicate crimes set out in 18 U.S.C. 1961.

Let me take the opportunity, Mr. Chairman, to endorse again the inclusion of access device fraud as a RICO predicate. It is important to bear in mind that the RICO statute was specifically enacted in 1970 to curb the growing problem of the infiltration of business and government by organized crime elements.

As a result, the RICO statute makes punishable the investment of organized crime funds in businesses engaged in or the activities of which affect interstate or foreign commerce, or the acquisition or maintenance of an interest in or participation in the conduct of such a business by means of certain racketeering enterprises.

To meet these problems, the RICO statute established what were then unique remedies. In addition to the criminal penalties of incarceration and criminal fines, the RICO law authorized forfeiture of the profits and proceeds of racketeering enterprises, established equitable remedies to remove the tentacles of organized crime from legitimate organizations, and provided for civil damage actions.

The original list of RICO predicate offenses included mail and wire fraud, in recognition not only that fraud offenses are committed by organized crime syndicates, but that organized crime elements sometimes seek to gain influence over legitimate organizations in order to carry out fraud schemes.

In short, the RICO statute is peculiarly suited to fraud because its remedies of forfeiture, equitable relief, and civil damages are often necessary if we are to effectively address complex criminal fraud schemes. For this reason, we felt the access device fraud violations should be added to 18 U.S.C. 1961.

Mr. Chairman, it is no secret, of course, that we have been cautious in suggesting additional predicates. This caution stems in large part from our view that RICO is a unique law that could be jeopardized if over-extended.

We remember the assaults on the RICO statute by the defense bar and by local law enforcement officials in the 1970s who were concerned that we were going to take over the enforcement of local laws.

As a result of these experiences, we have detailed departmental guidelines whereby every RICO prosecution is reviewed in Washington before being filed in order to avoid repetitions of past criticisms that we were abusing or over-using the RICO law.

Having reviewed, authorized, and followed the progress of over 500 RICO prosecutions since 1984, we in the Criminal Division feel that we can distinguish needed additions to RICO from those whose virtues are mostly cosmetic.

We continue to maintain that additions to RICO should be very carefully evaluated. Most forms of criminal activity are already prohibited under RICO in one form or another. For example, RICO already encompasses many forms of violent acts related to murder, robbery, and extortion, including conspiracies and attempts to commit these offenses.

Moreover, Section 1952B of Title 18, which was enacted in 1984, prohibits assaults with a dangerous weapon and similar violent crimes committed in furtherance of RICO-type enterprises.

Thus, many of the serious forms of weapons offenses are already covered by RICO or by the new Section 1952B offense. It goes without saying, however, that all firearms offenses constitute a serious problem in this country.

As you know, Federal laws comprehensively deal with the illegal use of firearms and explosives in a number of ways. For example, Section 922 of Title 18 alone specifies some 37 variations of weapons-related offenses. Most of these offenses are punishable by at least 5 years' imprisonment, some by ten and several by 15-year sentences. In addition, Section 5861 of Title 26 proscribes 12 additional weapons activities to include an individual's receipt or possession of any unregistered firearm.

With respect to specific firearms offenses, Mr. Chairman, we recommend that Section 922(o) of Title 18 be added as a RICO predicate. This section relates to unlawful transfer or possession of a machine gun.

In our view, this addition will bring within RICO's reach a particularly egregious form of weapons offense, one that is often committed by organized criminal elements. Obviously, we do not seek the addition to RICO's list of predicate crimes of all forms of weapons violation.

When Congress enacted RICO, many Federal felonies were left off the list either because existing statutes were adequate or because certain crimes, however serious, were not typical of organized crime behavior directed against enterprises.

Nevertheless, we believe, Mr. Chairman, that the addition of Section 922(o) is an appropriate addition to RICO that will strengthen our organized crime programs without blurring RICO's original focus.

I thank you, Mr. Chairman. That concludes my remarks. I will be glad to try to answer any questions you may have, sir.

Senator METZENBAUM. Thank you, Mr. Keeney. I do have some questions.

In fact, I must say to you, Mr. Keeney, that I am somewhat shocked at your position. I am shocked that the Justice Department would see fit to oppose adding these offenses to RICO: knowingly selling firearms to a convicted felon, trafficking in stolen firearms, interstate transportation of firearms with intent to commit a felony, trafficking in firearms by convicted felons. I have problems in seeing why the Justice Department opposes those.

You support adding the machine gun provision, but the bill already includes the machine gun violations of the National Firearms Act and no one has objected to that provision. So as to any provision where there is controversy, you are actually saying do nothing.

Do you know that the Attorney General personally told the leadership of local law enforcement groups that he supported adding a series of serious firearms violations to RICO? Are you aware of that?

Mr. KEENEY. I am aware that he had discussions with these people. I know the Attorney General supports the addition of this machine gun-type offense. We are not endorsing these other offenses, Mr. Chairman, but, on the other hand, if Congress in its wisdom decides to include them, we are not going to strongly oppose them.

Senator METZENBAUM. But the fact is that Mr. Meese, according to the information we have, and I think according to the testimony that we will have before us today, told the law enforcement officers that he supported a series of serious firearms violations being added to RICO.

Now, your testimony does a reversal, although I gather now you are saying that if the Congress sees fit to add it, the Justice Department would not oppose it. Is that correct?

Mr. **Keeney**. Mr. Chairman, the latter part is correct. I do not think it is a complete reversal. We are in favor of and we are endorsing the inclusion of one of the most serious gangster-type weapons, automatic weapons.

With the others, we cannot come along so far as to endorse them, but we have no strong objection if the Congress chooses to include the more egregious of these offenses as predicates.

Senator **Metzenbaum**. Were you aware of the fact that Mr. Keating, who is now Acting Associate Attorney General with overall supervision over the Criminal Division, told me personally in a meeting in my office that he supported adding the following offenses to RICO: knowingly selling guns to a convicted felon, knowing receipt of guns by a convicted felon, knowingly transporting stolen guns, knowingly receiving stolen guns?

In addition, the Treasury Department informed the Justice Department that they supported including as a RICO offense the transportation of firearms with the intent to commit a felony.

Here is the Attorney General saying to the law enforcement people he supports the addition. Then you come before us and tell us in your written testimony you oppose the addition. Then you say you would not oppose it if the Congress agreed to it. Meanwhile, Mr. Keating, who is the Acting Associate Attorney General, comes in my office and says he agrees with those four additions.

Where is the Attorney General's office? Where is the Department of Justice? What is your position, and if you are opposed to adding these provisions, which you now say you are not if the Congress wants to include them, why this ambivalence?

Mr. **Keeney**. We are trying to draw a bright line, Mr. Chairman, and the bright line is with respect to one of the most serious gangster-type offenses. With respect to the other offenses, we do not object to the inclusion, but we are not endorsing them.

We do not think they are necessary. We think you can enhance penalties, if you choose, with respect to these other violations, and we do not think, Mr. Chairman, that every crime in the Federal code, including every gun-type violation, should be included as a RICO predicate.

The RICO statute is a very special statute that we have very carefully nurtured over the years and we just do not want to include every Federal crime in there as a predicate.

Senator **Metzenbaum**. Mr. Keeney, after the Attorney General made the statement that he did to the law enforcement officials, was there another meeting held at the Justice Department with the representatives of the NRA?

Mr. **Keeney**. I do not know, sir. I discussed this matter with the Attorney General and with Mr. Keating and we had some dialogue back and forth and this is the position that we came out with.

Senator **Metzenbaum**. One can only conclude that after the Attorney General had reached a position of support that somehow there was a reversal, and it is an indication of a caving-in to the NRA. Your senior officials say one thing one day; then they hear from the gun crowd and they say something else the next day.

You want to add credit card fraud to RICO because you say trafficking in and use of counterfeit credit cards is a common activity of organized crime groups. Is not trafficking in illegal firearms a common activity of organized crime groups?

Mr. **Keeney**. It is, of some organized crime groups. Mr. Chairman, we tried to focus on the most serious types of weapons that were being used frequently by organized crime groups.

We focused in on one or two that you mentioned in your statement that have a particular propensity for violence. As you know, traditional organized crime, the LCN, is not engaged in heavy violence with respect to machine-type weapons as are some of the emerging groups, such as the Jamaicans, to which you referred, and such as the Colombians, whom I think have been referred to.

Senator **Metzenbaum**. Yes, and according to the Bureau of Alcohol, Tobacco and Firearms, Jamaican drug rings, or posses, are heavily involved in illegal firearms activities, including supplying guns to convicted felons, trafficking in stolen firearms, and interstate gun smuggling.

Given that, how can you say trafficking in credit cards belongs in the list, but that trafficking in firearms does not? Would not adding serious firearm felonies to RICO make it easier to prosecute and convict drug kingpins?

Mr. **Keeney**. It would make it easier to make RICO cases against them. But, Senator, let me explain why we have the credit devices provision in there. It is in there because we can take advantage, if we have it in there, of the ancillary provisions in the RICO statute; namely, forfeiture and injunctive actions.

If people engaged in these various credit card schemes reap a lot of profit, put that profit into assets, we are in a position then to go against those assets. With respect to the people who are engaged in narcotics, we have available a remedy to proceed against them for forfeiture under the narcotics laws.

Senator **Metzenbaum**. Senator Thurmond, any questions?

Senator **Thurmond**. Thank you, Mr. Chairman.

Mr. Keeney, have members of organized crime traditionally been involved in gun trafficking?

Mr. **Keeney**. Yes, sir, they have been involved, but the people that are involved—for the most part, Senator Thurmond, the people who are involved in gun trafficking are not organized crime in the traditional sense. They are not the LCN; they are other, lesser groups.

Senator **Thurmond**. Mr. Keeney, to what extent is the Federal firearms enforcement program directed against organized criminal groups?

Mr. **Keeney**. Well, it is directed pretty heavily against narcotics offenders, Senator Thurmond, and there is a focus and there is a program which concentrates on felons, recidivists, repeat offenders, who have criminal records and who, when found in the possession of a weapon, are regularly prosecuted.

Senator **Thurmond**. Mr. Keeney, of the firearms cases initiated by the Bureau of Alcohol, Tobacco and Firearms, how many involve drug traffickers?

Mr. **Keeney**. Senator, I do not have the figures right before me, but something like 25 percent, I think.

Senator THURMOND. About 25 percent?

Mr. KEENEY. Yes, sir.

Senator THURMOND. Those are the only questions I have right now, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Mr. Keeney.

Mr. KEENEY. Thank you.

Senator METZENBAUM. There may be additional—in fact, I probably will have some communication with you as to this change of position with respect to Mr. Keating and his failure to be with us here today. I tried to reach him this morning to urge him to show up, but I do think the committee is entitled to an explanation as to why there is this reversal from Mr. Keating and the Department in view of the fact that we moved forward on that with certain understandings.

Mr. KEENEY. Mr. Chairman, in fairness to Mr. Keating, I have discussed this with him and I do not think that he was aware of the fact that he was expected to appear. I will communicate your concern to him.

Senator METZENBAUM. I do not mean to suggest that there was any demand upon him or anything of the kind that he appear and that he is in any way avoiding us. Rather, it was that I felt it was important that he be here.

When I learned that he was not on the list this morning and that you were going to be with us, notwithstanding the fact that we are very happy to welcome you, I did think Mr. Keating was an important witness in view of his direct conversation with me. So I will write to him shortly after the conclusion of this hearing.

Mr. KEENEY. I will communicate that to him, Mr. Chairman, and thank you very much, sir.

Senator METZENBAUM. Thank you, and thank you, Mr. Coffey.

[The statement of Mr. Keeney follows:]

STATEMENT

OF

JOHN C. KEENEY
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 1523 - RICO REFORM LEGISLATION

ON

MAY 19, 1988

Mr. Chairman and Members of the Committee --

I appreciate the opportunity to appear today regarding S. 1523, the civil RICO reform bill. As I understand that the hearing today is intended to focus upon the addition of new offenses to the list of RICO-predicate crimes set out at 18 USC 1961, I will limit my remarks to Section 4 of the amendment in the nature of a substitute for S. 1523.

As introduced, S. 1523 proposed no additions to the list of RICO predicates; neither did the predecessor bill in the 99th Congress. It appears that the Department of Justice may have inspired the now lengthy list of proposed RICO predicates when, at page 13 of his October 29, 1987, testimony before this Committee, Assistant Attorney General Weld suggested that 18 USC 1029, the new access device fraud statute, be added to the list of RICO predicates. We have since received revised bills that proposed ten or more new RICO predicates.

First, let me take this opportunity to endorse again the inclusion of access device fraud as a RICO predicate. It is important to bear in mind that the RICO statute was specifically enacted in 1970 to curb the growing problem of the infiltration of businesses and government by organized crime elements. As a result, the RICO statute makes punishable the investment of organized crime funds in businesses engaged in, or the activities of which affect, interstate or foreign commerce, or the acquisition or maintenance of an interest in, or participation in the conduct of, such a business by means of certain racketeering activities.

To meet these unique problems, the RICO statute established what were then unique remedies. In addition to the conventional criminal penalties of incarceration and criminal fines, the RICO law authorized forfeiture of the profits and proceeds of racketeering enterprises, established equitable remedies for use in removing the tentacles of organized crime from legitimate organizations, and provided for civil damage actions. The original list of RICO predicate offenses included mail and wire fraud in recognition not only that fraud offenses are committed by organized crime syndicates but that organized crime elements sometimes seek to gain influence over legitimate organizations in order to carry out fraud schemes.

In short, the RICO statute is peculiarly suited to fraud because its remedies of forfeiture, equitable relief, and civil damages are often necessary if we are effectively to address complex criminal fraud schemes. For this reason, we felt that access device fraud should be added to 18 USC 1961. While on the subject of fraud remedies, I would be remiss if I did not observe that it was the senior senator from Ohio who worked for years to secure enactment of what is now 18 USC 1345, approved as part of the Comprehensive Crime Control Act of 1984, which authorizes the Government to secure injunctions against the continued operation of fraud schemes pending criminal prosecution. I should also note that there is now under review within the Administration a Department of Justice legislative proposal to establish forfeiture as a remedy for all federal fraud offenses. I hope that proposal will be cleared for submission to Congress in the near future.

It is no secret, of course, that we have been cautious in suggesting additional predicates. This caution stems in large part from our view that RICO is a unique law that could be jeopardized if over-extended. I well remember assaults on the RICO statute mounted by the defense bar in the 1970s and by state and local law enforcement officials who were actively campaigning for scaling back RICO because they viewed it as a threat to state and local jurisdictions. As a result of these experiences, we have detailed departmental guidelines whereby every RICO prosecution is reviewed in Washington before being filed, in order to avoid repetitions of past criticisms that we were "abusing" or "over-using" the RICO law. Having reviewed, authorized, and followed the progress of over 500 RICO prosecutions since 1984, we in the Criminal Division feel that we can distinguish needed additions to RICO from those whose virtues are mostly cosmetic.

In our April 14, 1988, letter to Senator DeConcini, we first commented on the additional predicates suggested in the new version of S. 1523. In our May 9, 1988, letter to Senator Metzenbaum, we expanded those views. (Copies of those letters are attached to this statement for ready reference.)

We continue to maintain the view that additions to RICO should be very carefully evaluated. Most forms of criminal activity are already prohibited under RICO in one form or another. For example, RICO already encompasses many forms of violent acts relating to murder, robbery, and extortions, including conspiracies and attempts to commit these offenses. Moreover, Section 1952B of Title 18, enacted in 1984, prohibits assaults with a dangerous weapon and similar violent crimes committed in furtherance of RICO-type enterprises.

Thus, many of the most serious forms of weapons offenses are already covered by RICO or by the new Section 1952 offenses. It goes without saying, however, that all firearms offenses constitute a serious problem in this country. As you know, federal laws comprehensively deal with the illegal use of firearms and explosives in a number of ways. For example, Section 922 of Title 18 alone specifies some 37 variations of weapons related offenses. Most of these offenses are punishable by at least 5 years imprisonment, some by 10 years, and several by minimum 15-year sentences. See Section 924(e)(1). In addition, Section 5861 of Title 26 proscribes 12 additional weapons activities, to include an individual's receipt or possession of any unregistered firearm. See 5861(d).

The general proposal to add firearms violations as RICO predicates suggests, therefore, that the existing penalties provided in Chapter 44 of Title 18 might not always be adequate. The Committee may wish to explore this area. In any event, I would recommend that Section 924(c)(1) be amended to include RICO as a specified offense for which sentence can be enhanced if the offense is committed by the use of a deadly weapon or device.

This important amendment would cover a situation where a defendant commits an act of racketeering while armed, even though that act does not "involve" murder or robbery within the meaning of Section 1961(1)(A).

With respect to specific firearms offenses, we recommend that Section 922(o) of Title 18 be added as a RICO predicate. This section relates to unlawful transfer or possession of a machinegun. In our view, the addition will bring within RICO's reach a particular egregious form of weapons offense, one that is often committed by organized criminal elements.

Obviously, we do not seek the addition to RICO's list of predicate crimes of all forms of weapons violation. When Congress enacted RICO, many federal felonies were left off the list, either because existing statutes were adequate or because certain crimes, however serious, were not typical of organized crime behavior directed against enterprises.

Nonetheless, we believe that the addition of Section 922(o) is an appropriate addition to RICO that will strengthen our organized crime programs without blurring RICO's original focus.

In sum, Mr. Chairman, we appreciate the interest of this Committee in this issue and we are particularly grateful that the Committee has, in processing S. 1523, sought to expand the powers of federal law enforcement agencies.

I will be pleased to respond to any questions you may have.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 9, 1988

Honorable Howard Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies and
Business Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This responds to your letter of April 26, 1988, to the Attorney General regarding S. 1523, the RICO reform bill. In answer to your specific question as to the Department's "official" position on proposals to include firearms offenses in the list of RICO predicates, it remains as set out in my letter of April 14, 1988, copy enclosed, to Senator DeConcini.

Your letter suggests an inconsistency between our position on the proposed expansions of RICO predicates now before the Committee and the testimony of former Assistant Attorney General William F. Weld. As wire and mail fraud (18 U.S.C. 1341 and 1343) have long been RICO predicates, we have indicated that other federal fraud statutes should be included as well. We do, however, object to the notion that any offense which might be committed in aid of racketeering should automatically be added to the list of RICO predicates. Put simply, we believe that great care is required before altering the law.

I should note in this regard that numerous efforts have been made over the years to render the RICO law impotent. In addition, there was a challenge to the RICO law mounted in the late 1970s by state and local law enforcement officials who viewed it as encroaching upon areas traditionally within their jurisdiction. Having successfully resisted repeated attacks upon the RICO statute and having suffered through numerous hostile House and Senate oversight hearings inquiring into alleged abuses of the RICO law by federal prosecutors, I am sure you will understand why we continue to urge against hasty extension of RICO to embrace a variety of criminal statutes.

An argument could be made that the list of RICO predicates set out at 18 U.S.C. 1961 should be struck and the words "any federal crime" substituted in lieu thereof. Certainly, there are few federal criminal laws which have not been violated by organized crime syndicates. Such an expansion of RICO, though, would be totally destructive of the unique character of this statute and of the special place it occupies in federal law after eighteen years of prudent and highly effective use by this Department. While we support some expansion of RICO predicates as mentioned above, we are concerned about the continued dilution of perhaps the most important criminal statute in the Federal Criminal Code.

On the larger issue of civil RICO reform, perhaps I should reiterate that our preferred approach would be to have private civil actions limited to cases where a prior criminal conviction has been secured; this is the approach we proposed in July of 1986. However, we recognize that there is little support for our proposed approach to private civil RICO and since we do not wish to obstruct the passage of consensus legislation in this area, we have strived to avoid jeopardizing what appeared to be a fragile compromise worked out between business and consumer groups.

Notwithstanding our desire to adhere to a position of neutrality on reform of private civil RICO, some of the proposals to expand civil RICO by embracing personal injuries and the proposal to limit what we had understood to be an agreed retroactivity provision, appear at odds with the basic thrust of S. 1523: to narrow civil RICO in order to minimize abuses of the statute by private litigants.

We feel compelled, therefore, to reinforce the views set forth in my letter of April 14 regarding expansions to the current list of RICO predicates. Further, we will resist vigorously any modifications to criminal RICO provisions which, in our view, would undermine or in any other fashion jeopardize the effectiveness of the RICO statute. For example, we cannot accept:

(1) the language at page 2, lines 13 and 14 of the draft bill you forwarded authorizing federal suits to be brought by the Attorney General [or other legal officer authorized to sue]"; the bracketed langauge suggests that a suit can be brought on behalf of the United States without the approval of the Attorney General; and

(2) the wording of the affirmative defense set out beginning at page 8, line 13, which would apparently apply to actions brought by the United States; our understanding was that this

affirmative defense was to apply only to suits brought by private litigants. To make it applicable to suits on behalf of the United States would add a new hurdle to a successful federal RICO action when everything else in the bill is intended to facilitate governmental civil RICO actions.

We appreciate this opportunity to comment officially on this legislation.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

cc: Honorable Strom Thurmond
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 14 1988

Honorable Dennis DeConcini
United States Senate
Washington, D. C. 20510

Dear Senator DeConcini:

Your staff has inquired as to our views with respect to the proposal, in connection with S. 1523, to add a series of new predicate offenses to the federal RICO statute. We have reviewed the series of proposed new predicate offenses and believe that in three instances the proposed expansion of RICO predicates are seriously ill-advised.

More specifically, the Criminal Division prosecutors most familiar with the RICO statute oppose the suggested inclusion of firearms crimes, murder, and 18 U.S.C. 1952A to the RICO law. Our objections to these provisions are that:

(1) they are unnecessary -- the offenses already carry heavy criminal penalties; and

(2) they dilute the RICO Act almost to the point of converting it from a special organized crime statute into a "Federal Serious Crime Act" -- in short, the amendments would make virtually any gun crime or murder into a RICO offense.

For these reasons, the Department of Justice strongly recommends against creation of these three new predicate offenses. At the very least, any such dramatic expansion of the RICO statute should, in our view, receive careful consideration and public hearings. The RICO law is too important to be radically altered without careful deliberation and an opportunity for all interested parties to comment.

Sincerely,

Tm Boyd

Thomas M. Boyd
Acting Assistant Attorney General

Senator **Metzenbaum**. Our next witness is Jerald R. Vaughn, Executive Director of the International Association of Chiefs of Police, Gaithersburg, Maryland. We are happy to have you with us.

STATEMENT OF JERALD R. VAUGHN, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Mr. **Vaughn**. Thank you very much, Senator, Senator Thurmond.

The International Association of Chiefs of Police consists of nearly 15,000 top law enforcement executives in the United States and 68 nations. Our members lead and manage the Nation's largest police departments, our Federal agencies, as well as suburban and rural departments. They are the ones who are the policymakers within their organizations and direct the activities of each of those police organizations that I have described.

IACP supports legislation to include Sections 922 and 924 of Title 18 in the list of criminal offenses that serve as predicates for prosecution under the Racketeer Influenced and Corrupt Organizations statute. RICO is a tool to help fight organized crime, and we think it indisputable that organized crime is seriously involved in the illegal sale and transport of firearms in this country.

The drug trade is inextricably bound to the illegal trade in guns. They have to be. The narcotics trade produces large sums of money and large amounts of drugs which must be protected. This protection comes from guns, and in most instances guns which are illegally procured. Our ability to dismantle these gun-trafficking rings is greatly enhanced if we can prosecute with the RICO statute.

The Federal law enforcement agencies share our belief in the definite advantages to adding firearm statutes to the list of predicate crimes for RICO violation. They have provided us with examples which show that if RICO prosecutions can be predicated on firearms offenses, the bureaus can more effectively dismantle those criminal organizations.

We do not agree that legitimate gun dealers will be prosecuted by RICO. The very nature of the firearm violations is beyond the scope of legitimate gun dealers. Two acts of violating these gun laws are necessary to prove a pattern of racketeering activity and the violations must be knowingly and willfully committed.

The International Association of Chiefs of Police urges the committee to consider adding the firearms offenses to the list of predicate crimes for RICO violations. We specifically recommend that you look at the more serious violations: illegal sale of machine guns, willful and knowing sale of guns to convicted felons, interstate gun smuggling, and trafficking in firearms by convicted felons.

If you are serious about waging a war on drugs, understand that it must be coupled with a war against illegal firearms. If law enforcement is to be serious about either or both of these wars, you must legislatively give us the tools to realistically wage this war. We need firearm offenses added to the list of predicate crimes for RICO violations, and we would ask that this committee and the Senate give us the tools to wage this very important war.

Senator **Metzenbaum**. Thank you, Mr. Vaughn.

Do I understand your statement also represents the views of the Fraternal Order of Police?

Mr. VAUGHN. We work in concert with 13 other major law enforcement organizations on the Law Enforcement Steering Committee. In a meeting with the Attorney General 2 days ago, it was the position of the Fraternal Order of Police in strong support of the position that I just articulated to you.

Senator METZENBAUM. And will you tell us what occurred and what the statement was that was made to you in that meeting from the Department of Justice or the Attorney General?

Mr. VAUGHN. Well, we attempted to articulate our concerns in this matter and our desire to see the four crimes that I described to you to be added to the list of predicate crimes for prosecution under RICO.

The Attorney General wrote those four crimes down. While he made no specific commitment, he certainly indicated, in his judgment, based upon what he knew then, that it sounded reasonable to include them.

Senator METZENBAUM. Do you believe there is a connection between organized drug rings and serious firearms felonies?

Mr. VAUGHN. Absolutely. One only need look at the situation on the streets of Washington to see the clear connection. The types of firearms in possession of drug traffickers right here in this city is enough to more than make a case for what we ask you to do.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Mr. Vaughn, we are glad to have you with us.

Mr. VAUGHN. Thank you.

Senator THURMOND. Incidentally, I want to compliment you on the great job you do for your organization, and compliment your organization on the great service they render to law enforcement.

Mr. VAUGHN. Thank you very much.

Senator THURMOND. You have heard the testimony of Mr. Keeney. What is your reaction to his recommendation that only Section 922(o) of Title 18 relating to machine guns be added as a RICO predicate?

Mr. VAUGHN. Well, we certainly support adding the machine guns. However, we just think it simply does not go far enough; that, in fact, the other three violations, in our judgment, are absolutely critical to being able to effectively deal with the problem of illegal weapons in the hands of organized criminal activity and of drug traffickers.

Senator THURMOND. In other words, as I understand it, you not only favor machine guns being included, but any firearm or ammunition.

Mr. VAUGHN. We specifically believe that the illegal sale of machine guns, the willful and knowing sale of guns to convicted felons, interstate gun smuggling, and the trafficking in firearms by convicted felons are the four most serious violations that we think should be included.

Senator THURMOND. What do you feel would be a valid objection to not including these?

Mr. VAUGHN. I guess as we analyze it, we are not convinced that there is a valid objection to it because, in our judgment, based upon our firsthand experience in dealing with crime and criminals and criminals who are armed with high-powered weapons, these are the real bad guys out there. These are drug traffickers, these are organized crime assassins.

There is, in our judgment, no legitimate reason for objection to the inclusion of these four offenses in the RICO statutes. We have heard the objections that perhaps the competitor-to-competitor issue could be raised in these. But, quite frankly, it is totally invalid, in your judgment, because no competitor could raise an issue because the very sale of weapons to proscribed persons makes it impossible for a competitor to have profited in the first place. So we just do not see a legitimate basis for opposition to the inclusion of these four offenses.

Senator THURMOND. And you definitely do favor including those four, in addition to the machine guns?

Mr. VAUGHN. We very definitely do.

Senator THURMOND. I think that is all I have. Thank you.

Senator METZENBAUM. In your meeting with the Attorney General, there were present also all of the major law enforcement groups in the country?

Mr. VAUGHN. That is correct, all 13 of the major law enforcement associations.

Senator METZENBAUM. All supporting the inclusion of these additional four offenses?

Mr. VAUGHN. Very strongly supporting that position.

Senator METZENBAUM. Thank you very much, Mr. Vaughn. Your testimony is always helpful and we enjoy working with you.

Mr. VAUGHN. Thank you very much.

[The statement of Mr. Vaughn follows:]

TESTIMONY BY

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

CONCERNING

S. 1523

RICO REFORM

BEFORE THE COMMITTEE ON THE JUDICIARY

OF THE UNITED STATES SENATE

MAY 19, 1988

EXECUTIVE SUMMARY

The International Association of Chiefs of Police supports legislation to include sections 922 & 924 of Title 18 in the list of criminal offenses that serve as predicates for prosecution under the Racketeer Influenced and Corrupt Organizations Statute. RICO is a tool to help fight organized crime and we think ir indisputable that organized crime is seriously involved in the illegal sale and transport of firearms in this country.

The drug trade is inextricably bound to the illegal trade in guns. They have to be: the narcotics trade produces large sums of money and large amounts of drugs which must be protected. This protection comes from guns, and in most instances, guns which are illegally procured. Our ability to dismantle these gun trafficking rings is greatly enhanced if we can prosecute with a RICO statute.

The Bureau of Alcohol, Tobacco and Firearms shares our belief in the definite advantages to adding firearm statutes to the list of predicate crimes for RICO violations. They have provided us with examples which show that if RICO prosecutions can be predicated on firearm offenses, the bureau can more effectively dismantle these criminal organizations.

We do not agree that legitimate gun dealers will be prosecuted by RICO. The very nature of the firearm violations is beyond the scope of legitimate gun dealers. Two acts of violating these gun laws are necessary to prove a "pattern of racketeering activity". And the violations must be "knowingly and willfully committed."

The IACP urges the Committee to consider adding the firearms offenses to the list of predicate crimes for RICO violations. We specifically recommend that you look at the more serious violations: illegal sale of machine guns; willful and knowing sale of guns to convicted felons; interstate gun smuggling; trafficking in firearms by convicted felons.

If you are serious about waging a war on drugs, understand that it must be coupled with a war against illegal firearms. If law enforcement is to be serious about either or both of these wars, you must, legislatively, give us the tools to realistically wage this war. we need firearms offenses added to the list of predicate crimes for RICO violations. Please give us the tools to wage this war.

GOOD MORNING, SENATOR METZENBAUM AND COMMITTEE MEMBERS. I AM JERALD VAUGHN, EXECUTIVE DIRECTOR OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE. ON BEHALF OF CHIEF JOE CASEY, IACP'S PRESIDENT, AND THE ENTIRE EXECUTIVE COMMITTEE, I THANK YOU FOR INVITING US TODAY TO TESTIFY ON THIS IMPORTANT SUBJECT.

THROUGHOUT ITS HISTORY, THE IACP HAS INVOLVED ITSELF IN ISSUES THAT ADVANCE THE WELFARE AND WELL-BEING OF THE CITIZENS ITS MEMBERS ARE SWORN TO PROTECT. WE HAVE JUST SUCH AN ISSUE BEFORE US TODAY. OUR ASSOCIATION SUPPORTS LEGISLATION TO INCLUDE SECTIONS 922 AND 924 OF TITLE 18 IN THE LIST OF CRIMINAL OFFENSES THAT SERVE AS PREDICATES FOR PROSECUTION UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE. WE BELIEVE THAT THE VIOLATION OF FEDERAL FIREARM STATUTES CONSTITUTES A MOST SERIOUS OFFENSES THAT MUST BE PROSECUTED TO THE FULL EXTENT OF THE LAW. THE CRIMINAL AND CIVIL RICO STATUTES PROVIDE US WITH THE NECESSARY TOOLS TO MOUNT A SERIOUS CHALLENGE TO ORGANIZED CRIME. IT IS INDISPUTABLE THAT ORGANIZED CRIME IS SERIOUSLY INVOLVED IN THE ILLEGAL SALE AND TRANSPORT OF FIREARMS IN THIS COUNTRY.

"RICO" IS A PART OF THE ORGANIZED CRIME CONTROL ACT OF 1970. THE TITLE OF THE ACT EMPHASIZES ITS FOCUS: ORGANIZED CRIME. THE REASONING BEHIND THE PASSAGE OF THE RICO STATUTE WAS TO ALLOW FEDERAL AUTHORITIES TO PURSUE ORGANIZED CRIME "KINGPINS" - TO ALLOW FEDERAL AUTHORITIES TO REACH THOSE WHO DON'T PERSONALLY ENGAGE IN THE DIRECT CRIMINAL ACTS, BUT THOSE WHO DERIVE INCOME AND SUPPORT FROM THE EXISTENCE AND FUNCTIONING OF CRIMINAL ENTERPRISES. IT SEEMS THEN, TO US, THAT THE INCLUSION OF FEDERAL FIREARMS OFFENSES IN THE RICO STATUTE IS NOT ONLY NECESSARY, BUT MANDATORY. ORGANIZED CRIME TODAY IS HEAVILY INVOLVED IN DRUGS. THOSE OF US WHO ARE INTIMATELY CONNECTED TO THE REALITY OF CRIME TODAY KNOW THAT THE DRUG TRADE IS INEXTRICABLY BOUND TO THE ILLEGAL TRADE IN GUNS. THEY HAVE TO BE: THE NARCOTICS TRADE PRODUCES LARGE SUMS OF MONEY AND LARGE AMOUNTS OF DRUGS WHICH MUST BE PROTECTED. THIS PROTECTION COMES FROM GUNS, LARGE QUANTITIES OF GUNS AND, IN MOST INSTANCES, GUNS WHICH ARE ILLEGALLY PROCURED. IN NEW YORK CITY, THE OFFICE OF THE SPECIAL NARCOTICS PROSECUTOR, HEADED BY STERLING JOHNSON, IS KNOWN AS "GUNS AND DRUGS" BECAUSE THAT'S WHAT THEY DO.

OUR ABILITY TO DISMANTLE THESE GUN TRAFFICKING RINGS IS GREATLY ENHANCED IF WE CAN PROSECUTE WITH A RICO STATUTE. AT IACP, WE CAN THINK OF NO INTEREST THAT IS NOT SERVED BY USING RICO TO PROSECUTE THOSE WHO ILLEGALLY TRAFFICK IN

GUNS. THE LAW ENFORCEMENT COMMUNITY IS ASTOUNDED BY THE OPPOSITION WE HAVE FOUND HERE IN THE SENATE TO S. 1523.

WE HAVE CONSULTED WITH THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS AND ARE PLEASED TO ANNOUNCED THAT THEY SHARE OUR BELIEF IN THE DEFINITE ADVANTAGES TO ADDING FIREARM STATUTES TO THE LIST OF PREDICATE CRIMES FOR RICO VIOLATIONS. FOR EXAMPLE, BY TRACKING FIREARMS, LAW ENFORCEMENT HAS THE OPPORTUNITY TO UNOBTRUSIVELY ACQUIRE PERMANENT DOCUMENTABLE EVIDENCE THAT CAN BE PRESERVED UNTIL AN INVESTIGATION IS READY FOR OVERT INVESTIGATIVE TECHNIQUES. THIS EVIDENCE CAN BE USED TO IDENTIFY UNKNOWN MEMBERS OF A GANG AND AT TIME OF PROSECUTION, ENVELOP THEM WITH OTHER CONSPIRATORS. IF THE RICO STATUTE APPLIES TO THESE FIREARMS VIOLATIONS, WE THEN HAVE A COMPLETE SET OF TOOLS TO TOTALLY DISMANTLE THE ORGANIZATIONS BY ATTACKING ITS PROFITS AND PROFITABILITY.

ONE OF THE EARLIEST WAYS TO IDENTIFY A CRIMINAL ORGANIZATION IS THROUGH ITS PATTERN OF FIREARMS TRAFFICKING. DURING THE PAST FEW YEARS, ATF HAS IDENTIFIED AND EVENTUALLY PROSECUTED GANG MEMBERS FOR FIREARMS VIOLATIONS WHEN THE USE OF THESE FIREARMS WAS CLEARLY IN FURTHERANCE OF A CRIMINAL ENTERPRISE.

FIREARMS TRAFFICKING CAN BE TRACKED. THE TRACKS LEFT ARE PERMANENT IN THE FORM OF POLICE RECORDS, MANUFACTURING RECORDS, WHOLESALE AND RETAIL RECORDS AND

RECORDS OF THEFT. GENERALLY, INFORMATION FROM THESE RECORDS CAN BE COLLECTED BY INVESTIGATORS WITHOUT ALERTING CRIMINAL SUBJECTS. THESE RECORDS OF FIREARMS PURCHASED IN SOURCE STATES AND RECOVERED BY POLICE AT CRIME SCENES IN OTHER STATES CAN BE USED TO IDENTIFY MEMBERS OF A SPECIFIC CRIME GROUP. IF ENOUGH FIREARMS CAN BE RECOVERED, AN ENTIRE CRIMINAL ORGANIZATION CAN BE INFERRED FROM THESE RECORDS. UNLIKE ILLEGAL DRUGS THAT ARE DISPOSED OF WITHIN A FEW WEEKS OF ENTERING THE COUNTRY, FIREARMS AND RECORDS LAST VIRTUALLY FOREVER. IT IS OFTEN NOT NECESSARY TO SEIZE THEM OR EVEN DISCLOSE A LAW ENFORCEMENT INTEREST. CONSEQUENTLY, COVERT INVESTIGATIONS INTO A COMPLEX CRIMINAL ORGANIZATION NEED NOT BE JEOPARDIZED TO PRESERVE FIREARMS EVIDENCE. IF WE ARE ABLE TO TRACK A CRIMINAL ORGANIZATION IN THIS MANNER, AND THEN INSTITUTE A RICO CASE, WE CAN CRIPPLE THIS ORGANIZATION.

ALLOW ME TO ADDRESS THE MAJOR CONCERN THAT WE HAVE HEARD CONCERNING THE INCLUSION OF FIREARMS OFFENSES:

" INNOCENT GUN DEALERS WILL BE PROSECUTED."

UNDER RICO, THE GOVERNMENT MUST ESTABLISH A "PATTERN OF RACKETEERING ACTIVITY". THIS REQUIREMENT HAS BEEN INTERPRETED TO REQUIRE AT LEAST TWO ACTS OF RACKETEERING ACTIVITY. IT SEEMS CLEAR TO US THAT TWO ACTS OF INTERSTATE GUN

SMUGGLING, OR TWO ACTS OF TRAFFICKING IN FIREARMS BY CONVICTED FELONS OR TWO COUNTS OF WILLFUL AND KNOWING SALE OF GUNS TO CONVICTED FELONS, SHOULD INDEED SUBJECT ONE TO SEVERE PENALTIES, AND IF A CRIMINAL ORGANIZATION IS BEING CONDUCTED AND FINANCED THROUGH THESE ACTIVITIES, WE WANT THIS ORGANIZATION STOPPED.

THE FEDERAL FIREARMS STATUTES ARE WELL KNOWN. AND TO VIOLATE THEM, ONE MUST DO SO KNOWINGLY AND WILLFULLY. INNOCENT GUN DEALERS DON'T SMUGGLE GUNS INTERSTATE. INNOCENT GUN DEALERS DON'T KNOWINGLY SELL TO CONVICTED FELONS, ETC. IN FACT, WE THINK THAT IN THIS INSTANCE, THE VERY NATURE OF THE FIREARMS OFFENSES WILL ENSURE THAT THE PEOPLE PROSECUTED THROUGH RICO AND FIREARM OFFENSES WILL TRULY BE YOUR ORGANIZED CRIME FIGURES.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE URGES THIS SUBCOMMITTEE AND THE FULL JUDICIARY COMMITTEE TO ADD THE FIREARMS OFFENSES TO THE LIST OF PREDICATE CRIMES FOR RICO VIOLATIONS. SEVERAL WEEKS AGO WE JOINED SENATORS DENNIS DECONCINI AND ALFONSE D'AMATO HERE IN THIS ROOM TO ANNOUNCE LAW ENFORCEMENT'S SUPPORT FOR A VIGOROUS WAR ON DRUGS. WE WERE PROUD TO JOIN THE LARGE NUMBER OF LAW ENFORCEMENT AGENCIES SUPPORTING THIS LEGISLATION. HOWEVER, I HASTEN TO ADD TO THE MEMBERS OF THIS FULL COMMITTEE: IF INDEED YOU ARE SERIOUS

ABOUT A WAR ON DRUGS, UNDERSTAND THAT IT MUST BE COUPLED WITH A WAR AGAINST ILLEGAL FIREARMS. IF LAW ENFORCEMENT IS TO BE SERIOUS ABOUT EITHER OR BOTH OF THESE WARS, YOU MUST, LEGISLATIVELY, GIVE US THE TOOLS TO REALISTICALLY WAGE THIS WAR. WE NEED FIREARMS OFFENSES ADDED TO THE LIST OF PREDICATE CRIMES FOR RICO VIOLATIONS. PLEASE GIVE US THE TOOLS TO WAGE THIS WAR.

THANK YOU VERY MUCH. I WOULD BE HAPPY TO RESPOND TO ANY OF YOUR QUESTIONS.

Jerald R. Vaughn was appointed executive director of the 14,500-member International Association of Chiefs of Police on September 10, 1985. Established in 1893, the IACP currently has members in 68 nations.

As the executive director, Vaughn oversees all organizational activities at IACP's World Headquarters near Washington, D.C. and each of its international regional division offices. He has over 20 years of progressively responsible police experience, including having served as the chief of police in two cities. He was decorated for service above and beyond the call of duty by the governor of the state of Colorado while serving as an undercover agent in a federally funded drug task force. He holds a master's degree in public administration and a bachelor's degree in the administration of justice.

Director Vaughn serves on the United Nations Commission on Narcotics and Dangerous Drugs in Vienna, Austria and is the IACP representative to Interpol in St. Cloud, France. He is on the advisory boards of the FBI/DEA Sports Drug Awareness Council, the National Institute Against Prejudice and Violence, the Federal Law Enforcement Training Center and the Law Enforcement Memorial Trust. He is on the 13-member National Law Enforcement Council and has served as the chairman of the Law Enforcement Steering Committee, which is comprised of the major police representative organizations in the United States. He served as the cofacilitator of the National Cooperative Drug Strategy and Demand Reduction Project, which was a joint endeavor by the IACP, the Drug Enforcement Administration and the Justice Department's Bureau of Justice Assistance. He oversees the Police Policy Resource Center and the Deadly Force Reduction Program of IACP. He is editor-in-chief of *Police Chief* magazine, *IACP News*, and the *Journal of Police Science and Administration*.

The International Association of Chiefs of Police is a professional organization comprised of over 14,500 top law enforcement executives from the United States and 68 nations. IACP members lead and manage several hundred thousand law enforcement officers and civilian employees in international, federal, state and local governments. Members in the United States direct the nation's largest city police departments including New York City, Los Angeles, Chicago, Detroit, Houston and others, as well as suburban and rural departments throughout the country.

Since 1893, the IACP has facilitated the exchange of important information among police administrators and promoted the highest possible standards of performance and conduct within the police profession. This work is carried out by functionally oriented committees consisting of police practitioners with a high degree of expertise that provide contemporary information on trends, issues and experiences in policing for development of cooperative strategies, new and innovative programs and positions for adoption through resolution by the association.

Throughout its existence, the IACP has been devoted to the cause of crime prevention and the fair and impartial enforcement of laws with respect for constitutional and fundamental human rights.

Senator METZENBAUM. Our next witness is—Mr. Spurlock is not in the audience, is he?

[No response.]

Senator METZENBAUM. Mr. Lawrence D. Pratt, executive director, Gun Owners of America, and at the same time, James Baker, director of Federal Affairs, ILA, National Rifle Association, and Neal Knox, executive director of the Firearms Coalition, from Silver Spring.

We are happy to have you with us. Good morning, gentlemen. Mr. Pratt, please proceed.

STATEMENT OF A PANEL CONSISTING OF LAWRENCE D. PRATT, EXECUTIVE DIRECTOR, GUN OWNERS OF AMERICA; JAMES JAY BAKER, DIRECTOR OF FEDERAL AFFAIRS, INSTITUTE FOR LEGISLATIVE ACTION, NATIONAL RIFLE ASSOCIATION OF AMERICA; AND NEAL KNOX, EXECUTIVE DIRECTOR, FIREARMS COALITION

Mr. PRATT. Good afternoon, Mr. Metzenbaum. I appreciate this opportunity to appear here today before this committee for Gun Owners of America. I am not going to have time to finish my statement, so with your permission, I would like to ask that the rest of my statement that I do not have time to submit——.

Senator METZENBAUM. Without objection, the statements of each of the witnesses will be included in the record in their entirety.

Mr. PRATT. Thank you.

Senator METZENBAUM. The 5-minute limit will prevail.

Senator THURMOND. I might say before you start that, without objection, I ask unanimous consent that a statement by Senator Hatch appear in the record.

[The statement of Senator Hatch follows:]

STATEMENT OF SENATOR ORRIN G. HATCH

RICO AND FIREARMS

MAY 19, 1988

MR. CHAIRMAN. RICO IS A GREAT WEAPON IN OUR BATTLE AGAINST ORGANIZED CRIME. IT PERMITS THE GOVERNMENT OR THOSE HARMED BY ORGANIZED CRIME TO PREVENT THE MAFIA FROM INFILTRATING LEGITIMATE BUSINESSES.

S. 1523 AND ITS PREDECESSORS IN EARLIER CONGRESSES, HOWEVER, HAVE FOCUSED ATTENTION ON A PROBLEM WITH RICO IMPLEMENTATION. INSTEAD OF A TOOL AGAINST ORGANIZED CRIME, RICO BECAME A HARASSMENT TOOL IN COMMON BUSINESS LITIGATION. IN SHORT, RICO WAS ABUSED. IT WAS EXTENDED INTO AREAS WHERE CONGRESS NEVER ANTICIPATED IT WOULD BE USED.

TODAY WE ARE GATHERED TO EXAMINE WHETHER RICO OUGHT TO BE EXTENDED INTO STILL OTHER FIELDS, NAMELY THE FIELD OF FIREARMS REGULATION. IF, OF COURSE, THERE IS A CLEAR NEED TO STRENGTHEN FEDERAL ENFORCEMENT TOOLS IN THE AREA OF FIREARMS VIOLATIONS OR IF MAFIA ELEMENTS ARE INFILTRATING THE FIREARMS

BUSINESS, THEN PERHAPS CONGRESS SHOULD GIVE PRIORITY TO STRENGTHENING FIREARMS ENFORCEMENT WITH RICO SANCTIONS. AS A RESULT OF THE 1986 FIREARM REFORMS AND EARLIER STATUTES, FIREARMS VIOLATIONS ARE ALREADY PUNISHED HEAVILY. MANY FIREARMS VIOLATIONS ALREADY CARRY HEAVY PRISON SENTENCES. THIS RAISES QUESTIONS ABOUT THE NEED FOR RICO INVOLVEMENT.

GIVEN THE HISTORY OF ABUSE OF THE RICO STATUTE, I AM QUITE WARY OF EXTENDING RICO INTO STILL OTHER AREAS. HOWEVER, IF THE LAW ENFORCEMENT NEED EXISTS, I WILL BE THE FIRST TO ASSIST THAT EFFORT. ACCORDINGLY, I LOOK FORWARD TO HEARING EVIDENCE OF THE NEED FOR CIVIL TREBLE DAMAGE SUITS IN THE FIELD OF FIREARMS REGULATION.

Senator THURMOND. You may proceed.

Mr. PRATT. Thank you.

I would like to approach this issue in terms of how these powers would be enforced, and I think we have to then look at the Bureau of Alcohol, Tobacco and Firearms. The recent history of the BATF is one of falsification of evidence, of perjury and abuse of power that cries out for reduction of their authority, not an increase of it.

Three years ago, the Senate, joined the next year by the House, overwhelmingly voted for the Firearms Owners Protection Act. It was clearly the hope of the measure's supporters that the warrantless prosecutions of the BATF would be ended by that legislation, but there is now no doubt that those hopes have been bitterly disappointed.

The BATF is an agency out of control in its running amuck over the civil liberties of the citizens of this country. The BATF's behavior constitutes a civil liberties crisis that should be the subject of these hearings, not an extension of power to an agency that has already hideously perverted the concept of law enforcement.

For some time, GOA has been involved in the defense of a number of people who have had their basic civil liberties smashed by BATF agents, not just from one office, but from BATF offices all across the country.

To illustrate various violations that have occurred, I will refer to the cases of several people. A review of these cases compels us to conclude that rather than adding firearms offenses to RICO, the need is to provide defendants with attorneys' fees for title 26 cases involving machine guns won by the defense.

Defendants also need the same protection for title 18 cases involving other firearms in cases involving actions occurring before the effective date of the Firearms Owners Protection Act.

The brief descriptions which follow are accurate, but hardly do justice to fully describing the extent of the outrages perpetrated by the BATF. This body should conduct hearings and invite the defendants in the cases I will be describing to come and testify so that all of the facts can be known.

The first example is Arnold Limatoc. He was indicated in 1986 for illegal possession of a fully automatic AR-15 machine gun. The two BATF agents contradicted themselves on the stand during the trial. One of the agents testified that after Limatoc met them at the door with his AR-15, Limatoc unloaded it and then removed a part from the gun.

When asked what he was doing, the agent told the court that Limatoc replied, "I am taking out the auto sear." The auto sear is a part that would have made the AR-15 function automatically as a machine gun. The court could not believe this account of the facts. That Limatoc would so candidly incriminate himself by acknowledging the gun had an auto sear, the magistrate found absolutely incredible. "It would be," he said, "like a murderer saying 'just a minute, please, while I hide the body.' "

The magistrate stated that he simply could not accept the version of the facts offered by the BATF agents, who had exchanged hand signals while one of them was on the stand in a desperate effort to get their stories to match.

And the magistrate added, "Much more plausible and accepted by the court is the defendant's version. He led the agents straight to the pistol identified in the search warrant, unloading and carrying the AR-15 rifle en route. After the agents had seen the pistol and seen that it was not illegal, then they began to rummage around, including looking at the rifle, but it was too late. The warrant had been executed. The agents were no longer legally in the defendant's residence," said the judge.

The Limatoc case involved an illegal search, which violates the fourth amendment, as well as what the court obviously believed to be perjury by the BATF agents.

I could point to some other examples, and I would like to just make sure that I have time during this period to point to a couple of policemen who were SWAT team members in Camden, New Jersey, who were treated in a highly unprofessional behavior by a BATF agent who misrepresented what he was doing when he came to them on an investigation; and, lastly, a Sergeant Corcoran of the Pennsylvania State Troopers, who was the Trooper of the Year in 1986, and his trial was just recently concluded and the judge was just simply outraged that the kinds of charges that were brought in against the trooper were based on evidence the BATF had tampered with.

Senator METZENBAUM. Mr. Pratt, it seems to me that you are speaking more about your concern with the BATF than you are about——.

Mr. PRATT. That is correct, sir, because as we thought about these proposals we concluded that beyond the merits of any of the individual proposals to add different firearms offenses to RICO is the very important question of who is going to be responsible for that authority and that power.

It would be the BATF's responsibility, and we think that would just intensify what is already a civil liberties crisis.

Senator METZENBAUM. Thank you.

[The statement of Mr. Pratt follows:]

GUN
OWNERS
OF AMERICA

Testimony of

Lawrence D. Pratt, Executive Director

Gun Owners of America

Presented Before the Senate Judiciary Committee

May 19, 1988

Chairman Metzenbaum, Members of the Committee,

My name is Lawrence Pratt. I serve as Executive Director of Gun Owners of America. GOA represents more than 100,000 United States citizens who seek to protect their firearms freedoms guaranteed by the second amendment to the Constitution.

We appreciate this opportunity to appear before this body to register our opposition to amendments to S. 1523 that would add several firearms offenses to the RICO statute. We oppose this broad extension of federal power to the area of firearms that would be placed in the hands of the Bureau of Alcohol, Tobacco and Firearms (BATF).

The recent history of the BATF is one of falsification of evidence, perjury and abuse of power that cries out for a reduction of their authority, not an increase of it. Three years ago, the Senate, joined the next year by the House, overwhelming voted for the Firearms Owners' Protection Act. It was clearly the hope of the measure's supporters that the "warrantless prosecutions" of the BATF would be ended by the legislation.

There is now no doubt that those hopes have been bitterly disappointed. The BATF is an agency out of control and running amuck over the civil liberties of the citizens of this country. The BATF's behavior constitutes a civil liberties crisis that should be the subject of these hearings, not an extension of power to an agency that has already hideously perverted the concept of law enforcement.

For some time, GOA has been involved in the defense of a number of people who have had their basic civil liberties smashed by BATF agents, not just from one office, but from BATF offices all across the country.

To illustrate various violations that have occurred, I will refer to the cases of Arnold Limatoc of Hawaii, John Robertson of British Columbia (the case took place in Washington state), Jim Bosse of California, Wayne Scott of Florida, Sylvia Daniel of Georgia, James Corcoran of Pennsylvania and Mick Spadea of New Jersey.

A review of these cases compels us to conclude that rather than adding firearms offenses to RICO, the need is to provide defendants with attorneys fees for Title 26 cases (involving machine guns) won by the defense. Defendants also need the same protection for Title 18 cases involving other firearms, in cases involving actions occurring before the effective date of the Firearms Owners' Protection Act.

The brief descriptions which follow are accurate, but hardly do justice to fully describing the extent of the outrages perpetrated by the BATF. This body should conduct hearings and invite the defendants in the cases I will be describing to come and testify so that all of the facts can be known.

Arnold Limatoc was indicted in 1986 for illegal possession of a "fully automatic AR-15 machine gun." The two BATF agents contradicted themselves on the stand during the trial. One of the agents testified that after ~~Limatoc~~ met them at the door with his AR-15, Limatoc unloaded it, and then removed a part from the gun. When asked what he was doing, the agent told the court that Limatoc replied: "I am taking out the auto sear." The auto sear is a part that would have made the AR-15 function automatically as a machine gun.

The court could not believe this account of the facts. That Limatoc would so candidly incriminate himself (by acknowledging the gun had an auto sear) the magistrate found "absolutely incredible." It would be, he said, like a murderer saying, "Just a minute please, while I hide the body."

The magistrate stated that he simply could not accept the version of the facts offered by the BATF agents (who had exchanged hand signals while one of them was on the stand in a desperate effort to get their stories to match) and, the magistrate added: "Much more plausible, and accepted by the court, is the defendant's version: he led the agents straight to the pistol identified in the search warrant, unloading and carrying the [AR-15] rifle en route. After the agents had seen the pistol and seen that it was not illegal, then they began to rummage around, including looking at the rifle. But it was too late. The warrant had been executed, and the agents were no longer legally in defendant's residence."

The Limatoc case involved an illegal search which violates the fourth amendment as well as what the court obviously believed to be perjury by the BATF agents.

John Robertson is a Canadian citizen residing in British Columbia who did business from time to time with Ed Warner, whose Washington state home he came to visit the day Warner was being raided by the BATF. Robertson was arrested on the spot, his vehicle was searched and several items were seized, none of which were illegal.

According to Robertson two U.S. $1,000 bills were among the items seized. However, the money did not appear on the official BATF list of items taken and Robertson has not seen the money since. On the other hand, the BATF has returned the calculator and the case in which the $2000 was stored after first denying that they existed.

Robertson was convicted on the strength of a "surprise" witness, Garry Trudo, that BATF produced in just three hours' time. It is now known that the BATF had in its possession the evidence that indicated that Trudo was lying on the witness stand. The BATF obtained Trudo's false testimony through an offer of immunity regarding a silencer that Trudo had assembled himself.

Also seized during Robertson's arrest were a number of credit card receipts that would have shown the court during the first trial that Robertson had traveled, just as he said he did, through the Western states of the U.S. ending up in Houston, Texas for the purpose of selling legal gun parts at gun shows in the cities along his route.

On the day that Garry Trudo alleged that Robertson was in Puyallup, Washington selling two illegal machine guns, Robertson was actually doing business in Houston, Texas. Robertson has collected the motels' copies of his credit card receipts since serving nine months of his life in jail. After Robertson had produced this exculpatory evidence, the BATF managed to find several of the Robertson's receipts which they had seized during his arrest.

The prosecutor in Robertson's case, so far, has made three different statements as to how many machine guns Robertson was supposed to have sold in Puyallup, claiming variously that Robertson sold two, one, and zero illegal weapons.

Trudo had told people that he had the two illegal machine guns that Robertson allegedly sold in Puyallup, Washington even though he was in Houston, Texas. The BATF never seized those guns according to an internal investigation conducted subsequent to the conviction of Robertson. In that internal investigation, Special Agent Hausken was found to be drinking excessively and unable to do a competent investigation. Not only did this not lead to the BATF's seeking to reopen the Robertson case, BATF management conducted a coverup by transferring Hausken to Indiana so that the problem could blow over.

In the Robertson case, the BATF stole exculpatory evidence from the defendant and withheld other exculpatory evidence from the defense at the trial. The prosecutor has lied twice about the alleged act committed by Robertson, and the BATF has engaged in a pattern of coverup to keep Robertson from succeeding with a new trial.

Jim Bosse is a successful businessman in Northern California. Bosse was able to demonstrate in court that his conviction on a weapons charge was based on an illegal search and the conviction has been overturned. The BATF went so far as to conspire with the California Department of Justice (CDOJ) to have a BATF Special Agent pose as a CDOJ agent. The CDOJ then found a reason to visit Bosse's property so that the BATF agent could illegally enter Bosse's property and search it so that he could later swear out a search warrant. After all this trouble to get on to Bosse's property illegally, the affidavit sworn out by the BATF agent was false.

During the 1986 trial the BATF themselves illegally converted to a functioning automatic a replica machine gun that Bosse used for a sales piece as well as a demonstrator for police departments interested in making purchases from him. In other words, the BATF tampered with the evidence. The judge had that charge thrown out immediately upon discovery of the BATF's deception.

Wayne Scott works for his family's agribusiness in Florida. He is a licensed pilot and regularly makes flights to Bermuda. Scott was importuned over a prolonged period of time by Eugene Schneider, a BATF informant, to illegally convert a rifle into a machine gun. Schneider said that he was afraid of pirates in the waters between Bermuda and Florida where many people have been robbed and murdered on the high seas, and that Schneider, a citizen of Bermuda, would not be able to get a machine gun legally.

After the indictment in 1986, Schneider told Scott's attorney, who was carrying a concealed recorder supplied by the government, that Schneider would tell the truth at trial about the BATF entrapment of Scott for $250,000. Scott was acquitted and Schneider was subsequently convicted and imprisoned for extortion. BATF Special Agent Molinari who was in charge of this miscarriage of justice was not disciplined or discharged. Instead, he was promoted. Scott's defense cost nearly $200,000 and there is no provision even under the Firearms Owners' Protection Act for Scott to recover his legal fees.

Sylvia Daniel is President of SWD, Industries, a Georgia firearms manufacturing company. In July of 1984, her company's Atlanta premises were raided by the BATF under the color of law because Special Agent Urrea had sworn out a search warrant based on false information that he supplied.

Urrea was interested in making law even though Congress had not enacted it, and he went after SWD as a test case. Urrea made statements in the search warrant to the effect that the suppresser parts being made by SWD could have no utility unless they were illegally combined with an outer tube to make an unregistered suppresser. The fact of the matter was, SWD was doing nothing that they had not already affirmed in writing from the BATF itself.

Urrea compounded this outrage by alleging a conspiracy with another company that made outer tubes for suppressers. Since there were legal uses for the SWD parts and the outer tubes when possessed together, there could hardly be a conspiracy to commit a legal act. But according to FOIA documents, the BATF spent over $50,000,000 trying to prove that legal acts were illegal.

Eventually, Urrea collapsed the government's case in a virtual whimper while testifying on the stand in 1986. When his grossly inaccurate allegations in the search warrant affidavit were disproven in court, Urrea shielded himself from a perjury charge by pleading incompetence. He admitted that he was not experienced in the law (he alleged that he was in the search warrant affidavit) and that he had learned a great deal about the law during that day in court.

Sylvia Daniel is still trying to calculate the cost to her and her company of the BATF's $50,000,000 assault. However many hundreds of thousands of dollars it was, she has no recourse to recover the legal fees from the government for its illegal actions against her.

Special Agent Urrea was selected by the BATF management for the Meritorious Service Award for his work in the SWD case. He was flown to Washington and given a cash award at a special banquet. What sort of signal does such mismanagement send to the BATF agents that are trying to be responsible law enforcement officers?

Sergeant James P. Corcoran of the Pennsylvania State Police was charged by the BATF with "machine gun" offenses, but the weapons were really AR-15 semi-automatic rifles. After tampering with the rifles, BATF agents manipulated some of them to double fire unreliably. A firearms expert, however, was prepared to testify that any semi-automatic can be altered to malfunction in that manner.

Calling this prosecution "a severe miscarriage of justice," the federal trial judge held that "without the automatic sear, the AR-15 with M-16 components is not a machine gun" and directed a verdict of not guilty on all the machine gun charges. After briefly deliberating, the jury then found Corcoran not guilty on the remaining charge of dealing without a license for occasional gun show sales.

While the Firearms Owners' Protection Act has made it clear that Congress never intended this kind of prosecution of individuals for "dealing without a federal firearms license," Corcoran was prosecuted under the law as it was before it was amended in 1986. In fact, the five-year statute of limitations had one month to run for one of the "dealing" charges BATF brought against him.

The judge went on to state:

> ...how an agency (BATF) can send a letter from a person who apparently is authorized to interpret the law and tell a person that a weapon, without an auto sear, is not fully automatic, and then turn around and then prosecute a person for a crime for doing exactly what that agency has said can be done, strikes me as being grossly unfair.

At least Corcoran's case was initiated after the Firearms Owners' Protection Act was in effect, so he is able to seek recovery of the over $30,000 in legal expenses that he incurred in defending himself against a case of lies and deception by the BATF. No disciplinary action is anticipated against the agents who perpetrated this "severe miscarriage of justice."

Corcoran, by the way, was the 1986 Officer of the Year of the Pennsylvania State Police. When it comes to violating civil liberties, at least I have to admit that the BATF is no respecter of persons. This point will be made again in the next case.

Mick Spadea is President of Jersey Arms Works (JAWS) located in a suburb of Camden, New Jersey. Two of Spadea's customers in 1985 for his Partisan Avenger semi-automatic machine pistol were two Camden SWAT team officers, Jim Phillips and Bob Kirkbride.

The police officers were paid a visit in early December of that year by BATF Special Agent Markovchick. He first told the officers that he wanted their cooperation as brothers in blue so he could "borrow" their Partisan Avengers for an ongoing criminal investigation of Mick Spadea and his company. The cops thought that this request was strange because the gun was being sold openly on the market.

When Phillips and Kirkbride expressed their puzzlement, Markovchick told them not to worry because they were not being arrested for owning machine guns. He then told the veteran police officers: "Once the Technology section classifies these guns as machine guns, we'll be able to move on Spadea." Phillips and Kirkbride then indicated they found Markovchik's position contradictory -- first he wanted to borrow the guns for their investigation, and then he said that BATF intended to classify the guns as automatic weapons even before they had a specimen.

Markovchick got upset and read the policemen their Miranda rights. Then he tried to tell them that that was just a formality and that they did not need an attorney at that point. Although they were upset and suspected foul play, the SWAT team officers felt constrained to allow Markovchick to walk off with their guns. Markovchick never gave them a receipt, and never gave them the promised report of the guns' evaluation.

Two weeks later, Spadea's factory was raided by the BATF. A technical expert was brought up from Washington who examined the Partisan Avenger for about 15 seconds and then declared that the gun that Phillips and Kirkbride knew to be a semi-automatic was, in BATF's official opinion, a fully automatic machine gun.

As officer Phillips summed up this shocking series of events: "Bob Kirkbride and I had heard all the horror stories about the 'little guy' being hassled by the BATF. As cops, we shrugged off the tales as being sour grapes. Well, from our experience we can assure you of this. BATF can and will confiscate your semi-automatic firearms." In other words, BATF will break the law.

To date no one has been indicted or arrested in the Jersey Arms case, although Mick Spadea has been under investigation by the BATF since 1982. Spadea has broken no laws, but he has been harassed in the same way that were Officers Phillips and Kirkbride.

These are just a few of the reasons why the BATF should not be given RICO powers. Gun Owners of America urges this committee to police the police before setting them lose to police anybody else.

Senator **Metzenbaum**. Mr. James Baker, director of federal affairs, National Rifle Association.

STATEMENT OF JAMES JAY BAKER

Mr. **Baker**. Mr. Chairman, the National Rifle Association of America appreciates the opportunity to present testimony in opposition to proposals to include firearms offenses among the list of RICO predicates in the latest draft of S. 1523.

The proposed amendment is unnecessary and inappropriate, and contrary to the best interests of those who must enforce the organized crime statute and those who must prosecute organized crime figures.

Amendments to RICO have been pending for nearly 3 years. Yet, an 11th hour amendment to include firearms offenses among the list of predicate offenses to S. 1523 was just proposed four weeks ago in a draft circulated to committee members only 3 days prior to the first day of mark-up by this committee.

To our knowledge, this amendment was never even discussed at any prior RICO hearings over the past 3 years. Surely, today's hearings, scheduled in haste, impedes careful consideration, careful deliberation, and a thorough opportunity for all interested parties to testify.

In light of the decision to postpone the mark-up of S. 1523 and call this hearing, we propose that the sponsor of the legislation withdraw his secondary amendment to Senator DeConcini's amendment to delete the firearms offenses from the list of predicate offenses, and ask unanimous consent that Senator DeConcini's amendment be accepted.

Once the controversial firearms offenses are deleted, the Senate Judiciary Committee can return to the business of the day, which is, after all, RICO.

For the benefit of those unaware of the Chairman's proposal, note that Section 5(B) of S. 1523, Title 18, U.S.C., Section 1961, would be amended by inserting before Section 1084 the following: "Sections 922 and 924, except for subsection (m) of Section 922."

The effect of this seemingly innocuous line would largely be to repeal two major provisions of the recently enacted Firearms Owners Protection Law, Public Law 99-308. As you will no doubt remember, 7 long years of thorough and careful debate and examination resulted in that comprehensive legislation. Countless hours of Senate hearings and House hearings preceded the enactment of that law.

First, by making all Gun Control Act violations, except recordkeeping violations, predicate offenses for RICO actions, this committee would effectively be drastically revising the standard of proof required of the government in firearms, since civil actions may be brought for RICO violations.

Under the RICO provisions, as amended by this legislation, the elements of what is essentially a criminal case brought under the Gun Control Act would only require proof by a preponderance of the evidence, as opposed to beyond a reasonable doubt.

Secondly, the provisions would undo one of the major accomplishments achieved in the Firearms Owners Protection Act. Congress deliberated extensively about which offenses would be a willful standard and which would only require a knowing standard.

This provision would require no criminal intent scienter standard at all for criminal and civil actions, and could therefore result in judgments under the RICO statute where there was no criminal intent to violate the law.

Thirdly, this provision would have a significant effect on seizures of private property by Federal agents. As you know, property allegedly involved in RICO violations can be seized by the Government and held until the case is resolved. Such proceedings can take years.

This provision would repeal a major reform of the Gun Control Act of 1968 enacted by Public Law 99-308, in which Congress saw fit to restrict seizures of property under the Federal Gun Control Act to only those firearms or ammunition involved in or used in a violation.

Yet, RICO-based seizures can encompass all property that the Government, on its own or at the behest of some private entity in the case of RICO, alleges to be the proceeds of criminal enterprise. Further, the RICO Act itself dictates that its provisions are to be liberally construed.

Fourth and finally, Mr. Chairman, the provisions of RICO allow suits to be brought by private individuals under the statute. This would mean that individuals or groups acting as private attorneys general opposed to the lawful ownership of firearms could easily run large numbers of legitimate firearms dealers and hobbyists out of business through repeated and publicized filings of lawsuits alleging a criminal enterprise and seeking treble damages. These individual dealers would be forced to defend, often at the expense of their business.

My statement goes on, Mr. Chairman, but in the interest of brevity I will leave it at that. Thank you.

Senator METZENBAUM. Thank you. Your entire statement will be included in the record. Thank you very much, Mr. Baker.

[The statement of Mr. Baker follows:]

STATEMENT OF JAMES JAY BAKER

DIRECTOR

FEDERAL AFFAIRS

INSTITUTE FOR LEGISLATIVE ACTION

NATIONAL RIFLE ASSOCIATION OF AMERICA

ON

LEGISLATION TO AMEND THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT - FIREARMS OFFENSES PROPOSED AS RICO PREDICATES

S. 1523

BEFORE THE

U.S. SENATE COMMITTEE ON THE JUDICIARY

MAY 19, 1988

Mr. Chairman:

The National Rifle Association of America, appreciates the opportunity to present testimony in opposition to proposals to include firearms offenses among the list of RICO predicates in the latest draft of S. 1523, currently pending in mark up and being debated before the U.S. Senate Committee on the Judiciary. The proposed amendment is unnecessary, inappropriate, ill conceived and contrary to the best interests of those who must enforce this organized crime statute and those who must prosecute organized crime figures.

Amendments to RICO have been pending for nearly three years, yet an eleventh-hour amendment to include firearms offenses among the list of predicate offenses in S. 1523 was just proposed four weeks ago in a draft circulated to Committee members only three days prior to the first day of mark up by the Senate Judiciary Committee. To our knowledge, this amendment was never even discussed at any prior RICO hearings over the past three years. Surely, today's hearing, scheduled in haste, impedes careful consideration, careful deliberation and a thorough opportunity for all interested parties to testify either personally or to present written testimony on this controversial proposal.

In light of the decision to postpone the mark up of RICO, S. 1523, and call this hearing, we propose the sponsor of the legislation withdraw his secondary amendment to Senator Dennis DeConcini's amendment to delete the firearms offenses from the list of predicate offenses in RICO and ask unanimous consent that Senator DeConcini's amendment be accepted. Once the controversial firearms offenses are deleted, the Senate Judiciary Committee can swiftly return to the business of the day -- Racketeer Influenced and Corrupt Organizations Amendments.

For the benefit of those unware of the Chairman's proposal, note at Section 5(B) of S. 1523, Title 18 U.S.C., Section 1961 (1) would be amended by inserting before ", section 1084" the following: "sections 922 and 924, except for subsection (m) of section 922 relating to Federal firearm laws . . . ."

The effect of this seemingly innocuous line would largely be to repeal two major provisions of the Firearms Owners' Protection Act, Public Law 99-308. As you will remember, seven long years of thorough and careful debate and examination resulted in that comprehensive legislation. Countless hours of Senate hearings and debate produced a 79 to 15 Senate vote to reform federal firearm laws. This amendment subverts the overwhelmingly expressed intent of the Senate in that vote. In addition, this amendment subverts the overwhelmingly expressed intent of the House in that vote. The House voted 292-130 to reform federal firearms laws.

First, by making all GCA '68 offenses, except record-keeping violations, predicate offenses for RICO actions, the Senate Judiciary Committee would effectively be drastically revising the standard of proof required of the government in firearms cases since civil actions may be brought for RICO violations. Under the RICO provisions, as amended by this legislation, the elements of what is essentially a criminal case brought under GCA '68 would only require proof by a preponderance of evidence. As you know, criminal violations of GCA '68 currently must be proved beyond a reasonable doubt.

Second, this provision could undo one of the major accomplishments achieved with the Firearms Owners' Protection Act. Congress deliberated extensively about which offenses would require a "willful" standard and which would only require a "knowing" standard. This provision would result in no "scienter" standard at all for criminal and civil actions, and could therefore result in judgments under the RICO statute where there was no intent to violate the law.

Third, this provision would have a significant effect on seizures of private property by federal agents. As you know, property allegedly involved in RICO violations can be seized by the government and held until the case is resolved. Such proceedings can take years. This provision would virtually repeal a major reform of GCA '68 enacted by P.L. 99-308, in which Congress saw fit to restrict seizures of property under GCA '68 to only "firearms or ammunition involved in or used in" any violations. Yet RICO-based seizures can encompass all property that the government on its own, or at the behest of some private entity, alleges to be the proceeds of the alleged criminal enterprise. Further, the RICO Act itself dictates in section 904 that its provisions are to be ". . . liberally construed . . . ."

Fourth, the provisions of RICO allow suits to be brought by private individuals under the statute. This would mean that individuals or groups acting as private "attorneys general" opposed to the lawful ownership of firearms might easily run large numbers of legitimate firearms dealers and hobbyists out of business through repeated and publicized filings of lawsuits alleging a criminal enterprise and seeking treble damages.

Mr. Chairman, there can be no valid arguments for the Senate Judiciary Committee to reverse judgments made by nearly 80 U.S. Senators and nearly 300 U.S. Congressmen after seven long years of debate and analysis. In addition, the ink is barely dry on the final federal regulations, published just less than two months ago, for the Firearms Owners Protection Act. Coincidentally, FOPA was signed into law exactly two years ago today.

The Firearms Owners Protection Act already carries heavy criminal penalties for those who misuse firearms in the commission of crimes of violence, for those who sell to felons or any prohibited persons, for those who traffick in any stolen firearms or for those who unlawfully possess or transfer machine guns. Nor can prohibited persons ship, transport, possess or receive any firearm which has been shipped or transported in interstate or foreign commerce without incurring heavy criminal penalties. These penalties also apply to individuals employed by prohibited persons who, with knowledge, engage in these same acts. Civil RICO is a law enforcement tool against white collar crime -- now is not the time to dilute it. The nation's law abiding gun owners did not take one step forward with the Firearms Owners Protection Act in order to take two steps backward with this proposed RICO firearms offenses amendment.

Mr. Chairman, the NRA would be interested in learning what evidence the Department of Justice can provide for the record on their experience with organized crime relative to the proposed firearms offenses amendment.

For the record, the attached correspondence between the Department of Justice and Senators Dennis DeConcini and Howard Metzenbaum, dated April 14, 1988 and May 9, 1988, in summary says the Department of Justice strongly opposes the inclusion of firearms crimes to the RICO law.

In conclusion, the National Rifle Association strongly urges the Judiciary Committee to oppose this provision of S. 1523 and support the amendment offered by Senator DeConcini to strike this specific language from S. 1523.

x x x

ATTACHMENTS

TMB:JEP:CHC:dji
S. 1523

U.S. Department of Justice Chron

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 14 1988

Honorable Dennis DeConcini
United States Senate
Washington, D. C. 20510

Dear Senator DeConcini:

Your staff has inquired as to our views with respect to the proposal, in connection with S. 1523, to add a series of new predicate offenses to the federal RICO statute. We have reviewed the series of proposed new predicate offenses and believe that in three instances the proposed expansion of RICO predicates are seriously ill-advised.

More specifically, the Criminal Division prosecutors most familiar with the RICO statute oppose the suggested inclusion of firearms crimes, murder, and 18 U.S.C. 1952A to the RICO law. Our objections to these provisions are that:

(1) they are unnecessary -- the offenses already carry heavy criminal penalties; and

(2) they dilute the RICO Act almost to the point of converting it from a special organized crime statute into a "Federal Serious Crime Act" -- in short, the amendments would make virtually any gun crime or murder into a RICO offense.

For these reasons, the Department of Justice strongly recommends against creation of these three new predicate offenses. At the very least, any such dramatic expansion of the RICO statute should, in our view, receive careful consideration and public hearings. The RICO law is too important to be radically altered without careful deliberation and an opportunity for all interested parties to comment.

Sincerely,

Tom Boyd

Thomas M. Boyd
Acting Assistant Attorney General

cc: DAG, CRIM, OLP, CIV, Greg Walden

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 9, 1988

Honorable Howard Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies and
Business Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This responds to your letter of April 26, 1988, to the Attorney General regarding S. 1523, the RICO reform bill. In answer to your specific question as to the Department's "official" position on proposals to include firearms offenses in the list of RICO predicates, it remains as set out in my letter of April 14, 1988, copy enclosed, to Senator DeConcini.

Your letter suggests an inconsistency between our position on the proposed expansions of RICO predicates now before the Committee and the testimony of former Assistant Attorney General William F. Weld. As wire and mail fraud (18 U.S.C. 1341 and 1343) have long been RICO predicates, we have indicated that other federal fraud statutes should be included as well. We do, however, object to the notion that any offense which might be committed in aid of racketeering should automatically be added to the list of RICO predicates. Put simply, we believe that great care is required before altering the law.

I should note in this regard that numerous efforts have been made over the years to render the RICO law impotent. In addition, there was a challenge to the RICO law mounted in the late 1970s by state and local law enforcement officials who viewed it as encroaching upon areas traditionally within their jurisdiction. Having successfully resisted repeated attacks upon the RICO statute and having suffered through numerous hostile House and Senate oversight hearings inquiring into alleged abuses of the RICO law by federal prosecutors, I am sure you will understand why we continue to urge against hasty extension of RICO to embrace a variety of criminal statutes.

An argument could be made that the list of RICO predicates set out at 18 U.S.C. 1961 should be struck and the words "any federal crime" substituted in lieu thereof. Certainly, there are few federal criminal laws which have not been violated by organized crime syndicates. Such an expansion of RICO, though, would be totally destructive of the unique character of this statute and of the special place it occupies in federal law after eighteen years of prudent and highly effective use by this Department. While we support some expansion of RICO predicates as mentioned above, we are concerned about the continued dilution of perhaps the most important criminal statute in the Federal Criminal Code.

On the larger issue of civil RICO reform, perhaps I should reiterate that our preferred approach would be to have private civil actions limited to cases where a prior criminal conviction has been secured; this is the approach we proposed in July of 1986. However, we recognize that there is little support for our proposed approach to private civil RICO and since we do not wish to obstruct the passage of consensus legislation in this area, we have strived to avoid jeopardizing what appeared to be a fragile compromise worked out between business and consumer groups.

Notwithstanding our desire to adhere to a position of neutrality on reform of private civil RICO, some of the proposals to expand civil RICO by embracing personal injuries and the proposal to limit what we had understood to be an agreed retroactivity provision, appear at odds with the basic thrust of S. 1523: to narrow civil RICO in order to minimize abuses of the statute by private litigants.

We feel compelled, therefore, to reinforce the views set forth in my letter of April 14 regarding expansions to the current list of RICO predicates. Further, we will resist vigorously any modifications to criminal RICO provisions which, in our view, would undermine or in any other fashion jeopardize the effectiveness of the RICO statute. For example, we cannot accept:

(1) the language at page 2, lines 13 and 14 of the draft bill you forwarded authorizing federal suits to be brought by the Attorney General [or other legal officer authorized to sue]"; the bracketed langauge suggests that a suit can be brought on behalf of the United States without the approval of the Attorney General; and

(2) the wording of the affirmative defense set out beginning at page 8, line 13, which would apparently apply to actions brought by the United States; our understanding was that this

affirmative defense was to apply only to suits brought by private litigants. To make it applicable to suits on behalf of the United States would add a new hurdle to a successful federal RICO action when everything else in the bill is intended to facilitate governmental civil RICO actions.

We appreciate this opportunity to comment officially on this legislation.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

cc: Honorable Strom Thurmond
Ranking Minority Member

Senator **Metzenbaum**. Mr. Neal Knox, executive director of the Firearms Coalition of Silver Spring.

STATEMENT OF NEAL KNOX

Mr. **Knox**. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to testify on behalf of the Firearms Coalition.

I want to stress that we applaud the intent of the RICO statutes to go above the street thugs and into the upper reaches of organized crime. However, I am totally opposed to inclusion of Gun Control Act provisions as predicates to the RICO law, for many of the same reasons that Mr. Baker just enumerated.

The RICO statute is directed at "Mr. Big," as we have heard the statement, and yet I have never heard of any organized criminal syndicate operation except one where the criminal syndicate is also involved in other violations of law which are already part of RICO. I see no advantage to the society to bring those provisions in.

However, I do see disadvantages. The RICO private civil suit section has been used for harassing civil actions against both individuals and corporations. I remember reading about one case in which disgruntled former employees of a non-profit corporation had used the RICO provisions as the basis of a lawsuit against their former bosses. The bosses retaliated by bringing that same type of RICO suit against the employees.

Now, I am concerned that the civil suit section be used either by the enforcing agency or by individual citizens to harass gun owners, collectors, and dealers. Unlike drugs and pornography, firearms serve a useful purpose and are lawfully owned, bought and sold in public and private commerce.

While possession or sale of a bag of cocaine is clearly illegal, possession or sale of a firearm may or may not be illegal, according to a series of highly technical questions.

Now, it is not news to anyone in this room that there are both gun zealots and anti-gun zealots. The enactment of this statute will surely lead to harassment of legitimate firearms owners by the anti-gun zealots because it gives them another opportunity to bring the same type of cases that we saw brought in the last couple of years by a Dallas lawyer trying to make third-party offenses under civil suits—making those persons who sold or legally owned a firearm liable for the misuse of a firearm in a subsequent crime by a third party.

Confusion over the gun laws is very real. A dozen members of Congress have told me that they received guns as gifts from persons outside their State of residence. Each of those is a 5-year Federal felony.

One Senator told me that he possesses two unregistered souvenir machine guns. The receipt and possession of what he considers to be inoperable souvenirs are 10-year Federal felonies.

Now, the uninitiated might think that anyone possessing or selling a machine gun would know it, but the BATF has varied in their interpretations as to what is a semi-automatic and what is a full automatic, and if they cannot decide, how is the individual citizen going to know?

Under these laws, with the lower preponderance of the evidence standards, it could get very rough on anyone who legally, legitimately, he thought, was owning simply a semi-automatic.

In 1986, BATF registered a group of machine guns kits, so-called, and in the last couple or three months has begun de-registering those kits because they said they made a mistake the first go-around and they are giving back the $200 transfer fee, despite the fact that the person paid it and went through a lengthy waiting period and all the problems of getting the gun.

I see that time is out. I will be glad to discuss these matters further in the questions and answers section, sir.

[The statement of Mr. Knox follows:]

Neal Knox Associates
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Rockville, MD 20853
301-460-6777

Testimony of Neal Knox

Executive Director, The Firearms Coalition

Before The Senate Judiciary Committee

Re: Making Firearms Statutes RICO Precedents

May 19, 1987

Mr. Chairman, Members of the Committee,

I appreciate this opportunity to testify on behalf of the Firearms Coalition, the clubs and associations it represents, and the readers of my firearms legislative columns and articles, which appear in Handloader, Rifle, Guns & Ammo and Shotgun News.

Although I do not claim any expertise concerning the racketeering and corrupt practices act, I am all too familiar with cases of Federal law being used abusively against normally law-abiding citizens who have somehow run afoul of the highly technical provisions of the Gun Control Act.

I applaud the intent of the RICO statutes -- to go above the street thugs and into the upper reaches of organized crime, and particularly applaud this law's apparent ability to deny the fruits of their illicit labors to drug and other organized crime kingpins who are making a mockery of our laws and threaten the very fabric of our society.

However, I totally oppose inclusion of any Gun Control Act provisions as predicates for the RICO law. While that statute is directed at organized, multi-layered criminal syndicates, I've never even heard of a large-scale firearms trafficking operation except for criminal organizations whose primary activity is some other illegal activity already covered under RICO, such as drug trafficking. Unlike drug runners, illegal gun runners are small or one-man operations, with all the principles directly involved in the operation, and with more than adequate conspiracy and Gun Control Act prohibitions -- each punishable by five or ten years' imprisonment. Accordingly there is no need to add these violations to the RICO law.

While I do not know how well the RICO provision allowing private civil actions for alleged criminal violations have worked against criminals, I'm aware that they have been used for harassing civil actions against individuals and corporations which were not involved in activities even remotely similar to what Congress had in mind when this law was enacted. I read about one case in which disgruntled former employees of a non-profit corporation had used the RICO provisions as the basis for a lawsuit against the officers of their former corporation; the corporate officers retaliated by bringing a racketeering and corrupt practices suit against the disgruntled employees.

I am extremely concerned that RICO's civil lawsuit provision would similarly be used to harass gun owners, collectors and dealers. Unlike drugs, pornography, pandering or the other illicit activities of racketeers, firearms serve useful purposes, and are lawfully owned, bought and sold in public and private commerce. While possession or sale of a bag of cocaine is clearly illegal, possession or sale of a firearm may or may not be legal according to a series of highly technical questions, including the exact make and model of the gun, the jurisdiction or the criminal, mental or military history and the citizenship and state of residence of the persons involved in the transaction.

Because of the complexity and multiplicity of firearms laws, it is quite easy to violate one or more without criminal intent, which is why Congress -- under the just-implemented McClure-Volkmer law -- required scienter for most of the felonies prosecutable under the Gun Control Act. Further, because both possession and transfer may be separate violations, and since each firearm involved represents a separate set of violations, it is quite possible to allege numerous violations of Federal or State statutes on the basis of a single transaction. All that may be necessary to establish a "pattern of criminal" activity is to cite two alleged violations, which could stem from one incident.

It is not news to anyone in this room that there are both gun zealots and anti-gun zealots. The enactment of this statute allowing civil suits to be brought by private citizens allegedly damaged by alleged gun law violations will surely lead to harassment of legitimate firearms owners, collectors and dealers. It will assure further clogging of the Federal Court system with allegations of illegal firearms transfers that might be simple errors or failure to understand the law, which may have been dealt with administratively by Treasury Department, or no-billed by a Grand Jury.

Confusion over the gun laws is very real. By exact count, 12 members of Congress have told me of receiving gifts of firearms from outside their state of residence -- and did not believe that both the giver and they, the recipient, had committed a Federal penalty punishable by $5,000 fine and five years imprisonment. Some years ago one of the members of this body, who has never been actively involved in the firearms issue, told me he possessed two unregistered souvenir machine guns; that Senator simply couldn't believe that his receipt and possession of what he considered inoperable souvenirs are Federal felonies.

Although the uninitiated might think anyone possessing or selling a machine gun would know it, the BATF has authorized the sale of certain semi-automatic rifles and pistols, then subsequently declared that particular model to be capable of easy conversion to full-automatic fire, therefore legally a machine gun. Further, because 'machine gun' is defined under the law to include the part or parts with which semi-automatics may be converted to full automatic, it is quite possible to sell or receive such a part without the slightest knowledge that it may be considered a machine gun, or with any intent to use it to make a machine gun, much less any intent to to use it in a crime of violence.

If that seems unlikely, the committee should be aware that in 1986 the BATF registered as machine guns certain combinations of parts with which a semi-automatic rifle may be converted to a machine gun. Subsequently, many people went through the lengthy procedure necessary for them to purchase a machine gun -- including fingerprinting, several months of background investigation, approval of local police and payment of a $200 tax -- and were told earlier this year that BATF no longer considered their registered "machine gun" to be a machine gun, that it was being de-registered, and that the $200 transfer tax would be refunded.

While it might be said that a government agency would never prosecute a case involving simple confusion over the law, the fact is that just such cases have been brought -- and lives destroyed. About 10 years ago a former Montgomery County, Maryland policeman and part-time gun dealer, Richard Boulin, was prosecuted for selling firearms from his personal collection without recording the sale. The very week of his felony conviction, the Acting Director of BATF wrote then-Senator Hayakawa that such transfers were legal. When Boulin's attorney asked the Court to reconsider, in light of BATF's letter to Sen. Hayakawa, BATF reversed its position, stating that their earlier interpretation of the law was incorrect. Incredibly, a few months later, in an interview by a gun dealer magazine, the then-BATF Director stated that transfers such as that for which Boulin was convicted were not illegal. McClure-Volkmer clarified that section of the law, but many ambiguities remain.

Prior to McClure-Volkmer, mere paperwork violations were

Federal five-year felonies. When that law was being debated I was told that such severity of the punishment was a guarantee that it would be used only for egregious cases, such as willful unrecorded sales to felons. Yet the FBI charged and the U.S. Attorney prosecuted 88 paperwork violations, punishable by 440 years imprisonment, against Howard Shaw a wealthy Florida businessman, whose part-time hobby was the sale of extremely expensive -- over $2,000 -- shotguns to fellow skeet shooters. Although he admitted to the violations, such as failure to record transfers within 24 hours, an appalled jury acquitted him on all counts -- after he had spent $100,000 for legal fees.

Accordingly, Mr. Chairman, on the basis of these and many other examples, I have little confidence inw arguments that common sense will dictate how a law is used. We have seen repeatedly that if a law can be misused, it will be.

My main question about all the proposals to make firearms violations predicates for RICO is: Why it is necessary?

The so-called compromise reportedly being offered by the Justice Department -- which, until 24 hours ago was arguing skilfully against any of the firearms sections being included in RICO -- attempts to establish the lowest possible conviction standard for a felony conviction.

Sec. 922(i) of Title 18 makes it unlawful to ship or transport a stolen firearm or ammunition interstate "having reasonable cause to believe" it is stolen. That is virtually a negligence standard for a felony conviction. I can certainly visualize a person being charged on the grounds that the firearm he is transporting was purchased at a below-market price, and therefore he "should have realized" that it was stolen.

Similarly, Sec. 924(b) creates the "reasonable cause to believe" standard for transporting a firearm with intent to commit a crime punishable by more than one year. That could be an intent to commit an armed robbery with the gun; if so, I would join in calling for swift and severe punishment. But what if the intended felony were merely the intent to give a shotgun to a friend in a state where shotguns are readily available? That is a federal felony, though few know it.

Section 924(c) provides for a mandatory sentence for misuse of a firearm in a drug trafficking or crime of violence -- more severe than the punishment authorized by RICO. I have strongly supported such laws since Rep. Bob Casey of Texas first proposed them in about 1963. But why should such an offense be placed within the RICO statute, when that law is designed to reach the mobster boss who doesn't dirty his hands -- yet this statute deals directly with the person committing the offense.

Finally, Sec. 5861(d) of Title 26 applies to receiving or possessing a machine gun, sawed off shotgun or suppressor which is not licensed -- the provision to which that Senator I mentioned earlier is subject. No knowledge of either law nor criminal intent is required under that statute. Why, then, should it be placed under RICO?

Although reportedly not included in Justice Department's package, the Acting Chairman last week suggested that, at minimum, Sec. 922(d) of Title 18 -- the prohibition of firearms sales to convicted criminals and other prohibited persons -- be included in RICO. Again, the burden of proof is a low "reasonable cause to believe" standard, and in a third-party civil suit, it would have to be shown only by a "preponderance of the evidence." It is easy to visualize a massive assault of ideologically motivated "racketeering" lawsuits against gun dealers or private citizens who -- it would be alleged, made firearms sales to prohibited persons without "adequate investigation" of their background.

In summary, RICO's criminal provisions have a higher burden of proof than the Gun Control Act, so "making criminal cases" cannot be the justification for the proposed amendments.

Few, if any, stolen or criminal firearms trafficking operations are the multi-layered criminal organizations which only can be reached through RICO. Those which are large criminal enterprises are invariably involved in drug dealing and other organized crime acts to which RICO already applies.

Is the purpose to allow de facto criminal prosecutions under the minimal "preponderance of evidence" standard?

Is the purpose to seize stocks in trade -- instead of only the guns used in an offense -- so they can be held until long after a typical small business is forced out of business?

Or is the purpose to allow third-party lawsuits by anti-gun zealots, alleging illegal acts and real or imaginary damages in order to harass firearms owners, collectors and dealers?

Whatever the stated purpose, I do not see any benefit for making firearms statutes predicates for the RICO statutes, but I see much opportunity for mischief.

Thank you for this opportunity to state our views.

Senator **DeConcini**. Mr. Chairman, would the Chairman yield so I could put in my statement?

Senator **Metzenbaum**. Without objection, the statement of the Senator from Arizona will be included in the record.

[The statement of Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DECONCINI

Thank you, Mr. Chairman.

I have somewhat mixed feelings about today's hearing. On the one hand, I am concerned that the committee is retracing steps taken by the Senate when debating the Gun Owners Protection Act—McClure/Volkmer. Yet, at the same time, I am open to discussion and willing to listen to the arguments on both sides. The committee has a responsibility to make informed decisions, but at some point information-gathering must end and decisionmaking must begin.

On Tuesday of this week I was told that the Department of Justice had remained steadfast in their opposition to new predicate offenses being added to the RICO statute. In a letter I received dated April 14, 1988 the Department states, "The criminal division prosecutors most familiar with the RICO statute oppose the suggested inclusion of firearms crimes * * *" The Department supported their position with two arguments: 1. inclusion is unnecessary because the offenses already carry heavy criminal penalties; and 2. inclusion would dilute the RICO Act, converting it into a "Federal Serious Crime Act".

Additionally, the Department sent a letter to Sentor Metzenbaum dated May 9, 1988, just 10 days ago, which once again setforth the Department's opposition to adding firearms offenses as RICO predicate offenses. As stated in that letter, "as to the Department's 'official' position on proposals to include firearms offenses in the list of RICO predicates, it remains as set out in my letter of April 14, 1988, * * * to Senator DeConcini".

Once more, at last week's executive meeting, I was told by Department of Justice representatives that the Department's position remained as stated—strong opposition to expanding RICO predicate offenses.

Today it appears that the Department has taken a position similar to their previous position on expansion of RICO predicate offenses.

The Department's position on issues is usually important to the committee. The Department regularly testifies before the committee and the information they provide is relied on by many of us. To discover that the Department's position had significantly changed at this late date would cast serious doubt on the Department's credibility and might cause one to ask "who is in charge?"

The position taken by the Department is not the only concern that I have. I am also concerned with the manner in which this hearing has come about. It does not seem prudent to this Senator to be holding hearings at this stage of the legislative process. If the practice of holding hearings every time there is a question raised at markup regarding possible amendments is continued, I fear that we will seldom reach the point where a markup will be completed and a bill will be reported out of committee. I do not mean to represent that I am opposed to holding hearings to gather information and answer pending-questions. That is not at all what I am saying. I am merely saying that we were on the verge of reporting out a valuable piece of legislation which many people have worked long and hard to produce. It is almost like saying wait, let's reconsider what plane to take, when your taxiing down the runway. This issue has been resolved long ago, yet here we are today back at the loading gate.

Even with my concerns, it would be incorrect to say that I am unwilling to listen. No matter what stage of the game we are in, I am always willing to listen.

Mr. Chairman, I look forward to today's testimony.

Thank you.

Senator **DeConcini**. Mr. Chairman, also, I have some questions that I would like to submit to the three members here.

Senator **Metzenbaum**. Without objection, we will submit the questions in writing and we will ask the members of the panel to respond as promptly as possible.

Senator **DeConcini**. Thank you.

Mr. Chairman, lastly, I would just like to say that I regret I was not here. I take some exception to what has been reported. The Chairman chided me for not being here.

Senator METZENBAUM. No, I did not. I did not chide you at all because I understand the obligations of all of us to be seven places at the same time. I had said that I had hoped that you would be here because it was your amendments that were being discussed, but I was not personally chiding you, and I would not do that.

Senator DECONCINI. I thank you, Mr. Chairman.

Senator METZENBAUM. If it came out that way, I apologize.

Senator DECONCINI. I appreciate that because I just could not be here for the beginning. I had other committee meetings, which I have now. The Intelligence Committee is meeting, as the Senator knows.

I have a very big interest in this and I have some thoughtful questions for this panel that I hope they will answer as soon as they can. This hearing was not coordinated with me. It was the prerogative of the Chairman to call it at his discretion, and I appreciate that and understand that, but sometimes everybody can not be here for the full hearing.

Thank you.

Senator METZENBAUM. I thank the Senator.

Senator SPECTER. Mr. Chairman, if I may make a comment, too, I regret that I cannot stay. There is scheduled at this same time an Intelligence Committee meeting. As a matter of fact, the Chairman, as well as Senator DeConcini and I, are members of that committee.

But I, too, want to express my interest here. Staff is present and I will be following the testimony.

Thank you very much.

Senator METZENBAUM. I thank the Senator from Pennsylvania.

I have just a couple of questions of Mr. Baker.

Mr. BAKER. Yes, sir.

Senator METZENBAUM. Mr. Baker, was this matter discussed with the Department of Justice, the position of the NRA?

Mr. BAKER. My understanding, Senator, is that their objections are longstanding. Attached to my testimony is their letter from April 14th where they state that the Criminal Division prosecutors most familiar with the RICO statute oppose the suggested inclusions. I have had no meeting with the Attorney General, if that is what you are asking.

Senator METZENBAUM. Well, I guess I am asking did you or any other leader of the NRA have a meeting with the Attorney General.

Mr. BAKER. No, sir, not on this issue.

Senator METZENBAUM. What about other persons at Justice concerning this subject?

Mr. BAKER. I have had no meetings in person on any of these issues.

Senator METZENBAUM. And how about——

Mr. BAKER. In fact, I know that Senator DeConcini's staff has, but nobody at the NRA has on any of these issues.

Senator METZENBAUM. And telephone calls?

Mr. BAKER. We talk back and forth on a number of issues, yes, sir.

Senator METZENBAUM. And has there been a conversation with the Attorney General on this?

Mr. BAKER. No, sir.

Senator METZENBAUM. With whom were there discussions concerning this pending measure?

Mr. BAKER. I think that those are private conversations and I am not going to——

Senator METZENBAUM. Private conversations with a public official?

Mr. BAKER. Well, then, I think that you can ask the people from the Department of Justice. It is not my position to tell you who I discussed it with.

Senator METZENBAUM. And did the NRA make it clear with whomsoever you spoke at the Department of Justice your objection to——

Mr. BAKER. We made it clear that we supported their letter to Senator DeConcini of April 14th, yes, sir.

Senator METZENBAUM. And how recently was that, Mr. Baker?

Mr. BAKER. I do not recall.

Senator METZENBAUM. Was it within the last week or 10 days?

Mr. BAKER. I do not recall, Senator.

Senator METZENBAUM. That is the kind of response the Attorney General himself often uses. I did not think you were going to be using it. [Laughter.]

Mr. BAKER. Well, it is a good thing I do not work for the Justice Department, I guess.

Senator METZENBAUM. Well, you certainly recall whether it was the last——

Mr. BAKER. Senator, we talk back and forth on a number of issues, not just this one. But to be quite honest with you, we have followed the lead of Senator DeConcini on this, who seems to have talked to the Justice Department on several occasions on it, since we have several letters. I see one here—it is attached to my testimony—addressed to you as well, of May 9th, also reiterating their opposition.

Senator METZENBAUM. Does the NRA agree with the characterization of the BATF as expressed by Mr. Pratt?

Mr. BAKER. I have not read Mr. Pratt's testimony. We have ongoing problems, just as all regulated and regulators do. I would have to fly-speck Mr. Pratt's testimony to tell you whether I agreed with all of it or not, Senator.

Senator METZENBAUM. I have no further questions.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Thurmond, I am going to go to the Intelligence Committee. Would you be good enough to conclude the hearing?

Senator THURMOND. I just have a couple of questions here and I will be through here. I will conclude it if you want to go.

Senator METZENBAUM. Thank you very much. Thank you, gentlemen.

Mr. BAKER. Thank you, Senator.

Senator **Thurmond** (presiding). Gentlemen, I have just a couple of questions here.

The first is—and you can just answer it very briefly, each one of you—the impression I gather from your testimony is not that you fear government abuse of RICO so much as you are concerned with private plaintiffs.

Is it not reasonable to assume that courts will throw out a private RICO civil claim without merit?

Mr. **Baker**. Senator, if I might answer that, I think that even the bringing of the suit of civil action forces the individual that is being sued to defend. He must hire a lawyer, he must appear in court and take time from his otherwise legitimate business to defend that suit.

There are suits brought for harassment purposes every day, and I think that this would provide an opportunity for those people in this country that are opposed to the legitimate ownership of firearms to do just that, and I think that that is what they would do.

Mr. **Pratt**. Senator Thurmond, I would like to respond, also. I would have to say that the government might bring some of these measures as harassment.

In the case of SWD Industries in Atlanta, Georgia, the Bureau of Alcohol, Tobacco and Firearms pursued a several-year case against that company. From Freedom of Information Act documents that have recently been made available, the BATF spent well over $50 million in pursuing a totally frivolous case that was completely lost, and the agent on the stand said, well, gee, he just did not realize all those aspects of the law. In other words the agent was ignorant of the law under which he sought to prosecute.

The company involved has not been able to figure out completely how much they have spent, but it was in the hundreds of thousands of dollars. A lot of people cannot afford to resist those kinds of suits and some people just have to decide to go to jail instead of trying to find that much money when they do not simply have that much money.

Senator **Thurmond**. Does anybody else want to comment?

Mr. **Knox**. I would agree with what was said by both of these gentlemen. I am concerned about civil actions brought by the Federal Government against individuals at whom they become personally distressed for one reason or another.

We have had some things occur over the years in enforcement of the gun laws that are beyond belief where the agencies involved, particularly BATF, but sometimes the Justice Department, have refused to give stocks in trade of firearms back to the legitimate owners after all charges were dropped and/or defeated in court. Those cases have been before the Congress in several hearings over the last 10 years.

We still see some of the same types of things occurring today and I just feel that it would be a mistake to give an agency which has acted this way unnecessary authority. Now, each of the offenses that were discussed earlier—interstate trafficking, carrying a firearm across State lines to commit a felony—certainly, we as law-abiding citizens are opposed to a person doing that if the intent is to commit a robbery in another State or to carry a firearm across with belief that it is going to be used in crimes of violence.

But it is also very possible and very easy to make an allegation that someone is doing this when, in fact, it is a legitimate transfer or a simple mistake. If that occurs, the person can be hauled before the court either by the agency or by civil standards by individuals in such a way to harass those people unbelievably.

I think that we will see that kind of thing happen if this is included. There is no reason for it. We have an easier standard right now to convict under criminal statutes under the Gun Control Act than would be imposed under the criminal statutes of RICO.

RICO is beyond a reasonable doubt. None of the Gun Control Act provisions are reasonable doubt; they are not even knowing. They are knowing or having reasonable cause to believe, and that is merely a negligence standard. I hate to think of deciding a negligence standard under a preponderance of the evidence.

Senator THURMOND. Now, the next question, if you care to comment on it, is if the evidence suggests that organized crime has traditionally been involved in firearms violations, would it not be reasonable to give our nation's law enforcement community additional strength to go after these professional criminals?

Mr. BAKER. Senator, I think that, first of all, that evidence does not exist. These Federal firearms predicates for RICO were suggested, as I said in my testimony, at the eleventh hour without benefit of even a hearing up until this date.

I think that there is a lot of groundwork that has to be done before we add the Gun Control Act violations as predicates under RICO. They do not even have to be criminal convictions before RICO actions are brought. I just think that there is a lot of groundwork that needs to be done before we can say that it justifies putting them under RICO as predicates.

Mr. PRATT. Senator Thurmond, I would agree with Mr. Knox' earlier remarks that the evidence is that other criminal activity which is already RICO activity can turn up these criminals. They will then also be subject to gun charges, but there is no evidence that a gun RICO would have helped in any way to get these same people because they are vulnerable under other charges.

Mr. KNOX. I believe that that sums it up. But, again, Mr. Chairman, the offenses that were discussed are already offenses. If the object is to make cases, it is easier to make a case with a lower burden of proof. As an esteemed lawyer, you know that.

The burden of proof is lower under the Gun Control Act than it is under the criminal section of RICO, and I cannot believe that the object on machine guns—for instance, 922(o), as written, has no criminal intent, to scienter, no knowledge required for conviction, just like a speeding ticket.

However, if that were part of RICO, it would all of a sudden be required that it be beyond a reasonable doubt. So if the object is to make cases, it does not compute that it has to go into RICO. Right now, the statute exists.

Senator THURMOND. As we are all aware, RICO is a civil as opposed to a criminal statute. That means it provides damages for a pattern of RICO offenses. What would you expect to be the damages in a case where a firearms dealer, perhaps without full knowledge of the law, sells an automatic weapon? Is he liable for the actions of someone who uses that weapon in crime? Is he liable only for damages caused directly by the sale? If so, what are those damages?

That is a question by Senator Hatch that he wanted asked.

Mr. **Baker**. Senator, if I might start, I think that RICO—you can correct me if I am wrong, but I think that RICO contains both criminal and civil provisions, but that is one of the problems, Senator.

You ask how much the treble damages would be. I do not think we know. I think that you never get more than you ask for in a lawsuit, and I am sure that in civil actions brought by private individuals or by government agencies, the intention would be to ask for whatever the traffic will bear, in many cases driving legitimate gun owners out of business.

Mr. **Pratt**. Senator, there have already been a number of harassment lawsuits in the liability area. Offering treble damages would certainly only increase that, and that would be another good reason to oppose these amendments.

Mr. **Knox**. Yes, sir, I would agree on that. I do not know how the actual damage would be brought, but I remember having read some civil actions. The allegations made in the lawsuit were absolutely ridiculous. They had no merit at all, and yet they were brought.

I challenged this. I asked my lawyer what is the justification for this and I was told that is what we lawyers call legal fiction. All they have to do is write a little legal fiction and get somebody into court and drive them bananas trying to defend a case at a hundred bucks an hour.

Senator **Thurmond**. Senator Hatch would like the Department of Justice to answer these five questions here.

[The questions follow:]

Senator Hatch's Questions for the Department of Justice

1. On April 14, the Department stated in a letter to Senator DeConcini that addition of firearm crimes in general as RICO predicates was unnecessary and could dilute the RICO Act. On May 9, you reiterated that stand in a letter to Senator Metzenbaum. On that occasion, you stated specifically that the Department's position "remains as set out in my letter of April 14." What occurred between May 9 and today to change your mind?

2. As we are all aware, this bill concerns RICO as a civil, as opposed to a criminal, statute. That means it provides damages for a pattern of RICO offenses. What would you expect to be the damages in a case where a firearms dealer—perhaps without full knowledge of the law—sells an automatic weapon? Is he liable for the actions of someone who uses that weapon in crime? Is he liable only for damages caused directly by the sale, if so, what are those damages?

3. My next question is similar to the first. If a citizen is found to possess more than one automatic weapon, that might be construed to be a RICO violation under your proposal. What are the damages that flow from a citizen possessing a firearm? Who would sue for damages and why?

4. You say that adding firearms violations as RICO predicates suggests that the penalties in Title 18 might not always be adequate. Is it your view that offenses punishable by 5 or 10 years in prison are too light? If so, can you recommend which crimes in this area need strengthening? I am not sure that RICO is the way to strengthen the enforcement of these violations when I am uncertain about where damages will arise. But if you are aware of reasons to strengthen these laws, please state your reasons forthrightly.

5. What evidence do you have of firearms dealers engaging in massive organized crime or are you making RICO into a "FEDERAL SERIOUS CRIMES ACT" as you warned against in one of your earlier letters?

Senator THURMOND. Is there anything else to say?

[No response.]

Senator THURMOND. If not, we stand adjourned. Thank you very much.

Mr. KNOX. I appreciate your courtesy, Senator.

Mr. PRATT. Thank you, Senator.

[Whereupon, at 3:08 p.m., the committee was adjourned.]

APPENDIX

II

Calendar No. 875

100th CONGRESS
2d Session

S. 1523

[Report No. 100–459]

To amend chapter 96 of title 18, United States Code.

IN THE SENATE OF THE UNITED STATES

July 22 (legislative day, June 23), 1987

Mr. Metzenbaum (for himself and Mr. Durenberger) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

August 8 (legislative day, August 5), 1988

Reported by Mr. Byrd (for Mr. Biden), with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~**SECTION 1. PATTERN OF UNLAWFUL ACTIVITY.**~~

~~(a) Chapter 96 Heading.—The heading for chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT~~

~~**ORGANIZATIONS**" and inserting in lieu thereof "**PATTERN OF UNLAWFUL ACTIVITY**".~~

~~(b) SECTION 1961.—Section 1961 of title 18, United States Code, is amended—~~

~~(1) in paragraph (1), by striking out "racketeering" the first place it appears and inserting "unlawful" in lieu thereof;~~

~~(2) in paragraph (5), by striking out "racketeering" each place it appears and inserting "unlawful" in lieu thereof;~~

~~(3) in paragraph (7), by striking out "racketeering" each place it appears and inserting "criminal" in lieu thereof; and~~

~~(4) in paragraph (8)—~~

~~(A) by striking out "racketeering" the first place it appears and inserting "unlawful activity" in lieu thereof; and~~

~~(B) by striking out "racketeering" the second place it appears and inserting "criminal" in lieu thereof.~~

~~(c) SECTION 1962.—Section 1962 of title 18, United States Code, is amended by striking out "racketeering" each place it appears and inserting "unlawful" in lieu thereof.~~

~~(d) SECTION 1963.—Paragraph (3) of section 1963(a) of title 18, United States Code, is amended by striking out "racketeering" and inserting "unlawful" in lieu thereof.~~

~~(e) SECTION 1968.—Section 1968 of title 18, United States Code, is amended—~~

~~(1) in subsection (a), by striking out "a racketeering investigation" and inserting "an unlawful activity investigation" in lieu thereof;~~

~~(2) in subsection (b), by striking out "racketeering" each place it appears and inserting "unlawful activity" in lieu thereof;~~

~~(3) in subsection (c), by striking out "racketeering" each place it appears and inserting "unlawful activity" in lieu thereof; and~~

~~(4) in subsection (f)—~~

~~(A) by striking out "racketeering" the first, second, and fifth places it appears and inserting "criminal" in lieu thereof;~~

~~(B) by striking out "racketeering" each other place it appears and inserting "unlawful activity" in lieu thereof; and~~

~~(C) by striking out "racketeer" end inserting "unlawful activity" in lieu thereof.~~

~~SEC. 2. CIVIL RECOVERY.~~

~~Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:~~

~~"(c)(1)(A) A governmental entity whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefor and shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee.~~

~~"(B) A civil action under subparagraph (A) of this paragraph must be brought by—~~

~~"(i) the Attorney General, if the injury is to the business or property of the United States;~~

~~"(ii) the chief legal officer of a State, if the injury is to the business or property of the State;~~

~~"(iii) the chief legal officer of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or~~

~~"(iv) the court-appointed trustee, if the injury is to the business or property of an enterprise for which a trustee has been appointed by a United States district court under section 1964(a) of this title.~~

~~"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in~~

~~any appropriate United States district court, a civil action therefor and shall recover—~~

~~"(A) threefold the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee, if the person who engaged in the conduct was, with respect to such conduct, convicted of an unlawful activity or of a violation of section 1962 of this title; or~~

~~"(B)(i) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee; and~~

~~"(ii) punitive damages of up to twice the actual damages, if—~~

~~"(I) the person whose business or property is injured is a governmental entity other than a unit of general local government; or~~

~~"(II)(aa) the person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or household use or investment, of a product, service, investment, or other property, or a contract for personal or household use or investment;~~

~~“(bb) neither State nor Federal securities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based, unless the plaintiff was injured by conduct proscribed by section 21(d)(2)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(A)) or unless the plaintiff is a small investor; and~~

~~“(cc) the plaintiff proves by clear and convincing evidence that the defendant acted in conscious and wanton disregard of the consequences of the defendant’s actions to the plaintiff.~~

~~“(3) In a civil action involving a claim for punitive damages under paragraph (2)(B) of this subsection, the trier of fact, in determining the amount of punitive damages, shall consider—~~

~~“(A) the degree of culpability of the defendant;~~

~~“(B) the degree of disparity in the bargaining positions of the plaintiff and the defendant;~~

~~“(C) any history of similar conduct by the defendant;~~

~~“(D) the benefits derived from the unlawful conduct by the defendant;~~

~~“(E) the number of persons victimized;~~

~~"(F) any prior decision by a court or State or Federal agency as to whether the defendant's conduct giving rise to the action violated applicable law or constituted bad faith;~~

~~"(G) the extent to which the class action aspect of the compensatory damage award fulfills the deterrent function of punitive damages; and~~

~~"(H) any other factor the court deems to be an equitable consideration bearing on the appropriate amount of punitive damages.~~

~~"(4)(A) A civil action under this subsection may not be commenced after the latest of—~~

~~"(i) three years after the date the cause of action accrues;~~

~~"(ii) three years after the conduct causing injury to the plaintiff terminates; or~~

~~"(iii) two years after the date of the criminal conviction required for an action under paragraph (2)(A) of this subsection.~~

~~"(B) The period of limitation provided in subparagraph (A) of this paragraph on a cause of action does not run during the pendency of a government civil action or criminal case relating to the conduct upon which such cause of action is based.~~

~~"(5) It shall be an affirmative defense to an action brought under this subsection that the defendant acted in good faith and in reliance upon a directly applicable regulatory action, approval, or interpretation of law by an authorized State agency. Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph, provided that discovery of such defense shall be allowed, as provided by law or rule of procedure, prior to the court's determination.~~

~~"(6) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.~~

~~"(7) In a civil action under this subsection, the court, upon motion, shall award a reasonable attorney's fee if—~~

~~"(A) the claim was frivolous, unreasonable, or groundless when asserted; or~~

~~"(B) the party asserting the claim continues to litigate after the claim is proven to be clearly frivolous, unreasonable, or groundless.~~

~~"(8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.~~

~~"(9)(A) As used in this subsection—~~

~~"(i) the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, any political subdivision of a State, and any enterprise for which a trustee has been appointed by a United States district court under section 1964(a) of this title (but only during the tenure of such trustee);~~

~~"(ii) the term 'small investor' means a natural person who, at the time the cause of action arises, either—~~

~~"(I) owned securities, excluding securities constituting investments in pooled investment funds that invest substantially all their assets in short-term debt instruments and maintain a stable net asset value or in United States debt instruments, valued at less than or equal to the median portfolio value of all United States securities holders of such securities; or~~

~~“(II) was a member of a household with an annual income of less than or equal to the United States median household income; and~~

~~“(iii) the term ‘security’, unless otherwise specifically provided in this Act, shall have the same meaning given to such term under the Securities and Exchange Act of 1934 except that such term shall only include instruments that comply with the requirements of the Securities and Exchange Act of 1934.~~

~~“(B)(i) For purposes of subparagraph (A)(ii), the Securities and Exchange Commission shall publish annually a survey that describes the securities holdings of natural persons in the United States. Such survey shall indicate the median portfolio value of all natural persons in the United States who own securities, excluding securities constituting investments in pooled investment funds that invest substantially all their assets in short-term debt instruments and maintain a stable net asset value or in United States debt instruments.~~

~~“(ii) The median portfolio value of all United States securities holders for years prior to the enactment of this Act shall be deemed to be the median portfolio value of all United States securities holders for the first year after enactment of~~

~~this Act as indicated by the Securities and Exchange Commission's survey.".~~

~~SEC. 3. EFFECTIVE DATE.~~

~~(a) GENERAL RULE.—The amendments made by this Act shall apply to any civil action commenced after the date of enactment.~~

~~(b) EXCEPTION.—In any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(B)(i) of section 1964(c) as amended by this Act, if this Act had been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under such paragraph (2)(B)(i), unless in the pending action—~~

~~(1) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred;~~

~~(2) the plaintiff is a charitable corporation or a non-profit government chartered corporation; or~~

~~(3) the court determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.~~

SECTION 1. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code, is amended by inserting after "of this chapter by issuing" the following: ", upon proof by a preponderance of the evidence,".

SEC. 2. CIVIL RECOVERY.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity, excluding a unit of local government other than a unit of general local government, whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by—

"(i) the Attorney General or other legal officer authorized to sue, if the injury is to the business or property of the United States;

"(ii) the chief legal officer of a State, if the injury is to the business or property of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government

of a State, if the injury is to the business or property of the unit of general local government; or

"(iv) the court-appointed trustee, if the injury is to the business or property of an enterprise for which a trustee has been appointed by a United States district court under section 1964(a) of this title.

"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover—

"(A) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee; and

"(B) punitive damages of up to twice the actual damages, if—

"(i)(I) the person whose business or property is injured is a unit of local government other than a unit of general local government; and

"(II) the plaintiff proves by clear and convincing evidence that the defendant acted in conscious and wanton disregard of the consequences of the defendant's actions to the plaintiff;

"(ii)(I) the person whose business or property is injured is a natural person, or an organization meeting the definition of exempt organizations under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj et seq.), an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act (29 U.S.C. 1001 et seq.), or an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.);

"(II) the person is injured by conduct proscribed by section 21(d)(2)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(A)), subject to the condition that the calculation of punitive damages shall be consistent with section 21(d)(2)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(C)), and that the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21(d)(2)(B)

of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(B)); and

"(III) the plaintiff proves by clear and convincing evidence that the defendant acted in conscious and wanton disregard of the consequences of the defendant's actions to the plaintiff; or

"(iii)(I) the person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, service, investment, or other property, or a contract for personal or noncommercial use or investment;

"(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(III) the plaintiff proves by clear and convincing evidence that the defendant acted in conscious and wanton disregard of the consequences of the defendant's actions to the plaintiff.

"(3) In a civil action involving a claim for punitive damages under paragraph (2)(B) of this subsection, the trier of fact, in determining the amount of punitive damages, shall consider—

"(A) the degree of culpability of the defendant;

"(B) the degree of disparity in the bargaining positions of the plaintiff and the defendant;

"(C) any history of similar conduct by the defendant;

"(D) the benefits derived from the unlawful conduct by the defendant;

"(E) the number of persons victimized;

"(F) any prior decision by a court or State or Federal agency as to whether the defendant's conduct giving rise to the action violated applicable law or constituted bad faith;

"(G) the extent to which the class action aspect of the compensatory damage award fulfills the deterrent function of punitive damages; and

"(H) any other factor the court deems to be an equitable consideration bearing on the appropriate amount of punitive damages.

"(4) A person who suffers bodily injury by reason of any conduct in violation of section 1962 of this title that includes a crime of violence as a predicate act may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall, as allowed under applicable State law, recover the actual damages sustained by reason of such violation (excluding pain

and suffering) and punitive damages of up to twice the actual damages, as well as the costs of the civil action, including a reasonable attorney's fee.

"(5) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee, if the person who engaged in the conduct was, with respect to such conduct, convicted of a racketeering activity or of a violation of section 1962 of this title.

"(6)(A) Except as provided in subparagraph (B), a civil action under this subsection may not be commenced after the latest of—

"(i) four years after the date the cause of action accrues;

"(ii) four years after the conduct causing injury to the plaintiff terminates; or

"(iii) two years after the date of the criminal conviction required for an action under paragraph (5) of this subsection.

"(B) A civil action brought pursuant to subsection (c)(1)(B) (i), (ii), or (iii) may not be commenced after the latest of—

"(i) six years after the date the cause of action accrues; or

"(ii) four years after the conduct causing injury terminates.

"(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or criminal case relating to the conduct upon which such cause of action is based.

"(7) It shall be an affirmative defense to an action brought under this subsection that the defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law. Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph, provided that discovery of such defense shall be allowed, as provided by law or rule of procedure, prior to the court's determination.

"(8) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.

"(9) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.

"(10) As used in this subsection:

"(A) The term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, any political subdivision of a State, and any enterprise for which a trustee has been appointed by a United States district court under section 1964(a) of this title (but only during the tenure of such trustee).

"(B) The term 'charitable corporation' means a charitable corporation formed under section 501(c)(3) of the Internal Revenue Code of 1986 or a corporation formed under section 501(c)(14)(B) of the Internal Revenue Code of 1986.

"(11)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages or other relief.

"(12) In a civil action under this subsection in which the complaint does not allege a crime of violence as a predicate act—

"(A) the term 'racketeer' shall not be used in referring to any party; and

"(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

"(i) 'racketeering activity' as defined in section 1961(1), shall be referred to as 'unlawful activity'; and

"(ii) 'pattern of racketeering activity', as defined in section 1961(5), shall be referred to as 'pattern of unlawful activity'.

"(13) In a civil action under this subsection in which the complaint alleges a crime of violence, the predicate acts constituting a crime of violence within the meaning of this subsection are offenses involving—

"(A) when chargeable under State law the following: murder, kidnapping, arson, or robbery;

"(B) when accompanied by bodily injury the following: extortion as defined by section 1951 of title 18; loansharking and other extortionate credit transactions as defined by sections 891-894 of title 18; obstruction of justice as defined in chapter 73 of title 18; the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States; or sexual exploitation of children as defined by chapter 110 of title 18; or

"(C) destruction of aircraft or aircraft facilities as defined by section 32 of title 18; arson as defined by section 81 of title 18; murder-for-hire as defined by section 1952A of title 18; or homicide as defined by chapter 51 of title 18.".

SEC. 3. INCREASED PENALTIES FOR HOMICIDE AND MAIMING.

Section 1963(a) of title 18, United States Code, is amended by striking "shall be fined not more than $25,000 or imprisoned not more than twenty years, or both" and inserting "shall be fined under this title and imprisoned for not more than twenty years (or for life, if the violation is predicated on an offense for which the maximum penalty includes life in prison), or both".

SEC. 4. ADDITIONAL PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended—

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B), by—

(A) striking "Section 201" and inserting "Section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 201";

(B) inserting before ", section 1084" the following: ", section 1029 (relating to fraud and related activity in connection with access devices),";

(C) inserting before ," section 1953" the following: ", section 1952A (relating to murder-for-hire)";

(D) inserting before ", section 2320" the following: ", section 2318 (relating to counterfeit materials)"; and

(E) inserting before ", (C)" the following: ", and chapter 51 (relating to homicide), chapter 73 (relating to obstruction of justice), and chapter 110 (relating to sexual exploitation of children)";

(3) by striking "or" before "(E)";

(4) by striking the semicolon at the end thereof and inserting a comma; and

(5) by adding at the end thereof the following: "(F) section 134 of the Truth in Lending Act, or (G) section 5861 of title 26 (relating to firearms control);".

SEC. 5. FEDERAL JURISDICTION.

Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b) by striking "residing in any other district";

(2) in subsection (b) by striking "in any judicial district of the United States by the marshal thereof." and inserting "anywhere the party may be found.";

(3) in subsection (c) by striking "in any other judicial district" and inserting "anywhere the witness is found";

(4) in subsection (c) by striking "in another district"; and

(5) in subsection (d) by striking "in any judicial district in which" and inserting "where".

SEC. 6. STATE JURISDICTION.

Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government.

SEC. 7. EFFECTIVE DATE.

(a) General Rule.—The amendments made by this Act shall apply to any civil action commenced after the date of enactment.

(b) Exception.—In any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(A) of section 1964(c) as amended by this Act because the person does not meet the requirements of either paragraph (2)(B)(i)(I), paragraph (2)(B)(ii), or paragraphs (2)(B)(iii)(I) and (II) of section 1964(c), if this Act had been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under such paragraph (2)(A), unless in the pending action—

(1) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred;

(2) the plaintiff is a charitable corporation; or

(3) the court determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.

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